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North Dakota Probate Code: Prior and Revised Article II

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NORTH DAKOTA PROBATE CODE: PRIOR AND REVISED ARTICLE II

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I. INTRODUCTION

The North Dakota Probate Code has been modeled on the Uniform Probate Code [hereinafter U.P.C.] since July 1, 1975.[1] As changes and revisions in the U.P.C. occurred throughout the years, they were then usually adopted in North Dakota. In 1991, the Legislature replaced its chapter on multi-party accounts with the Uniform Nonprobate Transfers On Death Act, which included the Uniform Multiple-Person Accounts Act and the Uniform TOD Security Registration Act.[2] In 1993, the Uniform Statutory Rule Against Perpetuities was adopted, replacing some statutes that had been law in one form or another in North Dakota since the last century.[3]

In 1990, the Uniform Law Commission substantially revised Article II of the U.P.C. and clarified the revisions with amendments in 1991 and 1993.[4] The revised Article II proposes statutes in the areas of intestate succession, elective share, wills, rules of construction, and other donative transfers. At its 1993 session, the North Dakota Legislature adopted

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1. N.D. CENT. CODE § 30.1-35-01 (1976). In addition to North Dakota, 15 states have adopted substantial portions of the U.P.C. They are Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, South Carolina, South Dakota, and Utah. Uniform Probate Code, 8 U.L.A. 1 (Supp. 1995). Many states have adopted certain articles and sections of the U.P.C. or revised their laws to conform to certain provisions in the U.P.C. *See* Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599 (1985).

2. N.D. CENT. CODE §§ 30.1-31-04 to -30 (Supp. 1995). The Non Probate Transfer on Death law avoids references to "joint accounts" and uses in its place the broader term "multiple-party account." *Id.* § 30.1-31-02. The POD account (A payable on death to B) and trust account (A in trust for B) are treated under a single law and do not have separate rules for each account. *See id.* § 30.1-31-04. A form clearly defining these accounts and the rights that attach to them is set forth in the law and used widely in North Dakota by financial institutions for their depositors. *Id.* § 30.1-31-05.

3. N.D. CENT. CODE §§ 47-02-27.1 to 47-02-27.5 (Supp. 1995). In adopting this law, the North Dakota Legislature repealed the restraint on the power of alienation law and adopted the common law rule against perpetuities. *Id.* § 47-02-27.1. In addition, the Legislature adopted a wait and see doctrine which saves interests that would initially be invalid under the common law rule against perpetuities. *Id.* Thus, the period of time that a non-vested interest must vest in order to be valid, is if it is certain to vest or terminate either no longer than twenty-one years after the death of a living individual (basically the common law rule against perpetuities) or within 90 years after the creation of the interest.

4. UNIF. PROB. CODE preface (1990) (amended 1993). The 1993 Amendments reorganized Article II's elective share law. *See* Lawrence H. Averill, Jr. & Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U.L.A.R. L. J. 631 (1995) (providing a short history of the U.P.C., and a discussion of the new Article II of the 1990 Uniform Probate Code). Professor Averill is also the author of the Uniform Probate Code in a Nutshell. *See* LAWRENCE H. AVERILL, JR., UNIFORM PROBATE CODE IN A NUTSHELL (4th ed. 1996).

most changes recommended in the revised Article II and scheduled them to be effective on August 1, 1995.[5] However, before the effective date, the Legislature, at its 1995 session which concluded on April 7, 1995, revised this law in the light of the 1993 amendments to Article II and in light of having second thoughts on some sections that had been previously adopted.[6] The revised law is based for the most part on the revised Article II as amended in 1991 and 1993 and became effective on January 1, 1996.[7]

The Uniform Probate Code was first promulgated in 1969 and Article II was redesigned in 1990 to address new developments in the law of gratuitous transfers in a modern and ever-changing society. In a Prefatory Note, the U.P.C. commented on the direction the new Article II took to respond to these developments:

> In the twenty or so years between the original promulgation of the Code and the 1990 revisions, several developments occurred that prompted the systematic round of review. Three themes were sounded: (1) the decline of formalism in favor of intent-serving policies; (2) the recognition that will substitutes and other intervivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission; (3) the advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having step-children and children by previous marriages and in the acceptance of a partnership or marital-sharing theory of marriage.[8]

The first theme of attacking stringent formalities in the wills area is not a new phenomenon.[9] Despite pleas to adopt a substantial compli-

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5. Uniform Probate Code Changes, ch. 334, 1993 N.D. Laws 1143.

6. Uniform Probate Code Changes, ch. 322, 1995 N.D. Laws 942.

7. Uniform Probate Code Changes, ch. 322, sec. 28, 1995 N.D. Laws 942. In this article, the current North Dakota probate law effective January 1, 1996 will be referred to as the "revised" law. The previous state probate law which was in effect until January 1, 1996 will be referred to as the "prior" law. The 1995 Cumulative Supplement of the North Dakota Century Code for title 30.1, The Uniform Probate Code, sets forth sometimes in a single section both the law effective until January 1, 1996 and the law effective on and after January 1, 1996. References to the 1995 Cumulative Supplement of the North Dakota Century Code citations in this article reflect that distinction.

The 1995 Cumulative Supplement of the Minnesota Statutes Annotated follows a similar classification of prior law valid until January 1, 1996 and the Minnesota revised law based on U.P.C. Article II effective on and after January 1, 1996. MINN. STAT. ANN. §§ 524.1-201, 524.2-110 to 524.3-1010 (Supp. 1995). Other states, in addition to North Dakota and Minnesota that have for the most part adopted the 1990 U.P.C.'s Article II with the 1991 and 1993 amendments include Arizona, Colorado, Montana, and New Mexico. Uniform Probate Code, 8 U.L.A. 1, 86 (Supp. 1995).

8. UNIF. PROB. CODE art. II, prefatory note (1990) (1993 amended).

9. *See* John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) (discussing the harsh formal requirements of the Wills Act).

ance doctrine, courts have rejected such pleas and regarded the execution of a will valid only if the statute of wills is strictly followed.[10] Nonetheless, the pre-1990 U.P.C. introduced a bare bones or basic minimum requirement approach to attested wills and holographic wills.[11] It also permitted a testator to devise items of tangible personal property in a separate statement or list as long as the writing was in the handwriting of the testator or signed by the testator.[12] Any such separate writing would previously have been declared invalid as a will because it did not conform to the statute of wills.

The revised Article II continues to question the need for strict formalities to be followed in the area of wills. It proposes the adoption of a dispensing power whereby a court could find a document in compliance with the law if the proponent of the document could establish by clear and convincing evidence that the decedent intended the document or writing to constitute his or her will.[13] Contained in the revised Article II are the following new rules: the conscious presence test for testator's requesting a proxy to sign a will or to assist in the revocation of a will;[14] an intent theory for nonademption of specific devises;[15] and a provision that accepts a signing of the form of a self-proved will as a signing the will itself.[16] Some rules based on the presumed intent of the testator, such as the revocation of a devise because of divorce or annulment, are now also applicable to nonprobate transfers.[17] The movement is to elevate intent over formality. As Professors Langbein and Waggoner point out: "The 1990 U.P.C. strives in a variety of places to vindicate the transferor's intent in circumstances in which the former law might have defeated it."[18]

The second theme of the revised Article II is the recognition of the utilization of various legal devices to transfer wealth such as living trusts, deeds, POD accounts, and insurance and annuity policies. More wealth

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10. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1038 (1994). *See also* James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992) (discussing the formalities and their effect on the testator's intent). For a North Dakota case, see *infra* notes 139-143 and accompanying text.

11. UNIF. PROB. CODE §§ 2-502, 2-503 (1969). The pre-1990 Code and the U.P.C. did not propose adoption of a nuncupative will.

12. *Id.* § 2-513.

13. UNIF. PROB. CODE § 2-503 (1990) (amended 1993). The document or writing could also be a partial or complete revocation of a will, an addition to or an alteration of a will, or a partial or complete revival of his or her formerly revoked will or of a formerly revoked portion of the will. *Id.* *See infra* notes 125-130 (discussing the dispensing power).

14. *See infra* notes 173-175 and accompanying text.

15. *See infra* notes 128-129 and accompanying text.

16. *See infra* notes 133-138 and accompanying text.

17. *See infra* notes 308-312 and accompanying text.

18. John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 874 (1992).

passes from generation to generation today through these nonprobate transfers than through a will which has become only one legal device among many in estate planning.[19] The approach of Article II is thus to accept the new playing field and to try to unify the rules of probate and nonprobate transfers. Rules that previously were uniquely applicable only to wills in the pre-1990 U.P.C. are now made applicable to nonprobate transfers or in the U.P.C.'s usage to "governing instruments." These rules of construction supply presumptions for the following areas: lapse;[20] the need to survive the decedent by 120 hours;[21] testamentary exercise of a power of appointment;[22] and the effect of a divorce or annulment of a spouse.[23] Likewise, rules applicable to nonprobate transfers are made applicable to wills such as certain rules of construction of class gifts.[24] In a sense, the proposal of relaxing the formalities for the execution of wills is an attempt to treat the law of wills in a way that courts traditionally have treated nonprobate devices by allowing documents to be reformed and by applying doctrines of substantial compliance and harmless error to insure that the intent of the parties is controlling.

The third theme runs mostly through the law of intestate succession and the elective share. The changes in the relationships of married couples to each other and to their children have demanded a new look at how property is to be allocated at the death of one of the spouses. The principles of equitable distribution applied when a marriage ends in divorce provide an insight into these relationships.[25] Both spouses are entitled to be treated as equal partners in an economic, as well as a social sense. Children are to be protected economically as well as socially. The family's life style has been restructured as a result of multiple marriages, divorces and re-marriages and the increase of stepchildren and children by a previous marriage. The idea of marital sharing or marriage being an economic partnership is reflected in the revised Article II's provisions on the elective share.[26] Support of children in new marital relationships is provided for in the revised intestate succession law.[27]

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19. *Id.* at 875. Not all estate planners are particularly pleased with the variety of will substitutes and other intervivos transfers involved in planning an estate. *Id.*

20. *See infra* notes 242-265 and accompanying text.

21. *See infra* notes 207-215 and accompanying text.

22. *See infra* notes 287-289 and accompanying text.

23. *See infra* notes 313-315 and accompanying text.

24. *See infra* notes 275-277 and accompanying text.

25. UNIF. PROB. CODE art. II, pt. 2, gen. cmt. (1990) (amended 1993).

26. *See infra* notes 62-66 and accompanying text.

27. *See infra* notes 38-39 and accompanying text.

Although these three major themes explain many changes in the revised Article II of the U.P.C., other themes are at work in the revised provisions. One theme protects financial institutions and purchasers for value from being subject to liability as a result of some new changes in the area of nonprobate transfers that extend the time for determining the owner of certain property. For example, the application of the requirement of survival by 120 hours for beneficiaries of insurance policies and POD accounts, will require insurance companies and banks to wait at least five days after a decendent's death to determine that the proper person is given the decedent's property. Likewise, because of the 120-hour survival requirement, an individual who purchases property within a few days after decedent's death from another who appears to be an heir or devisee of the decedent, might in fact be purchasing from the wrong person. To protect these payers, individuals who purchase property for value, and other third parties, in situations where the time for determining the true owner is extended, the revised law has, for the most part, eliminated their exposure to any liability. They will only be liable if they had notice, usually written notice, of the lack of entitlement on the part of the party with whom they have been dealing. Any person who receives benefits to which he or she is not entitled, is personally obligated to return the amount of or the value of the benefits to the person who is entitled to such benefits. The revised law extends this protection to payers, purchasers and other third parties in the following areas of law where time for determining the true owner is extended: elective share,[28] requirement of survival by 120 hours,[29] effect of homicide on intestate succession, wills, joint assets, life insurance and beneficiary designations,[30] revocation of probate and nonprobate transfers by divorce,[31] and anti-lapse.[32]

The main purpose of this paper is to present the differences between the revised North Dakota probate law and its prior law. In a few instances, the Legislature did not follow the recommendations of the Uniform Law Commissioners and these differences will be pointed out. The various differences will demonstrate the need either to stay the course with the current law or correct the law to meet the challenges of changing times.

28. N.D. CENT. CODE § 30.1-05-08 (Supp. 1995) (effective Jan. 1, 1996).
29. *Id.* § 30.1-09.1-02(5), (6).
30. *Id.* § 30.1-10-03(8), (9).
31. *Id.* § 30.1-10-04(7), (8).
32. *Id.* § 30.1-09.1-06(4), (5).

II. INTESTATE SUCCESSION

The major change in the revised intestate succession law concerns the share of the surviving spouse. The shares of all other persons and the definition of "representation" remain the same.[33]

The revised intestate succession law recognizes the results of empirical studies showing that spouses who die with a will often leave all their property to the surviving spouse and rely on that spouse to care for their children.[34] Under the revised law, the decedent's surviving spouse will take the entire intestate estate in two situations. First, the surviving spouse will take the entire estate if there is no descendant or parent of the decedent surviving the decedent. Second, the surviving spouse will take the entire estate if all the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent.[35] The second situation is a major change from prior law under which the surviving spouse could take the entire intestate estate only if there was no surviving issue or parent of the decedent.[36]

According to the revised law, the share of parents who take under the intestate succession law is decreased and the share of a surviving spouse in situations where there are surviving descendants of the decedent or the surviving spouse from other marriages is increased. If no descendants of the decedent survive the decedent, but the decedent is survived by a parent, the surviving spouse takes the first $200,000 plus three-fourths of any balance of the intestate estate.[37] If all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants

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33. N.D. CENT. CODE § 30.1-04-02 (Supp. 1995) (effective Jan. 1, 1996). *Id.* § 30.1-04-06 (Supp. 1995) (repealed effective Jan. 1, 1996).

A new section has been added to the intestate succession law which authorizes negative wills. At common law, it was generally held that even though a will disinherited an individual, if property passed, for some reason, through the intestate succession law, that individual was nonetheless entitled to his or her share. Under this new section, a decedent by will may expressly exclude or limit the right of an individual or class to succeed to decedent's property passing by intestate succession. Provisions in a will that guarantee that an individual or group will be effectively disinherited are: 1) "Brother Bob is not to receive any of my property;" 2) "Brother Bob is disinherited;" 3) "I devise $10.00 to my brother, Bob, and no more;" 4) "My brothers and sisters are disinherited." Once it is determined from the will provision that an individual or group members who survived the decedent cannot take any of the deceased's property that does in fact pass by intestate succession, that individual's or class's share to which the individual or group member of that class would have succeeded passes as if that individual or each member of that class had disclaimed the intestate share.

34. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 74, 75 (1991). *See also* UNIF. PROB. CODE § 2-102 (1990) (amended 1993).

35. N.D. CENT. CODE § 30.1-04-02(1) (Supp. 1995) (effective Jan. 1, 1996).

36. N.D. CENT. CODE § 30.1-04-02 (Supp. 1995) (effective until Jan. 1, 1996).

37. N.D. CENT. CODE § 30.1-04-02(2) (Supp. 1995) (effective Jan. 1, 1996). Under prior law, the surviving spouse received the first $50,000 plus one-half of the balance of the intestate share. *Id.*

who are not descendants of the decedent, then the surviving spouse takes the first $150,000, plus one-half of any balance of the intestate estate.[38] If one or more of the decedent's surviving descendants are not descendants of the surviving spouse, the surviving spouse takes the first $100,000 plus one-half of any balance.[39]

The remaining sections naming the persons entitled to take and determining their shares are unchanged in the revised law. If no surviving spouse survives the decedent, specified blood relatives of the decedent share the decedent's estate.[40] Also the same system of representation to determine the amount of the shares that each relative will take is maintained under the revised law.[41]

The North Dakota Legislature did not adopt the definition of representation recommended by the U.P.C. under which, for example, grandchildren whose parents predeceased their intestate grandparent would always take equal shares in their grandparents' intestate estate, in a situation where a child or children of the grandparent survived that grandparent.[42] The North Dakota Legislature did not change the definition of representation from the pre-1990 U.P.C. under which the houses of the grandfather's deceased children, who had children surviving the grandfather, would share equally with the grandfather's surviving children, with the grandchildren whose parents predeceased their grandfather taking what their parents would have taken had those parents been

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38. *Id.* § 30.1-04-02(3).

39. *Id.* § 30.1-04-02(4). Under prior law, if they were surviving issue, one or more of whom were not issue of the surviving spouse, the surviving spouse received one-half of the intestate share. *Id.*

40. *Id.* § 30.1-04-03. This law states that:

Any part of the intestate estate not passing to the decedent's surviving spouse under section 30.1-04-02, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

1. To the decedent's descendants by representation.
2. If there is no surviving descendant, to the decedent's parents equally of both survive, or to the surviving parent.
3. If there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation.
4. If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the deceden's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal paternal grandparents or either of them is both are deceased, the descendant's [sic] taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but of there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

41. *Id.* § 30.1-04-06. *See infra* note 43.

42. UNIF. PROB. CODE § 2-106 (1990) (amended 1993). For a definition of this system of representation, known as "per capital at each generation," see *infra* note 281.

surviving children.[43] Thus, if a grandparent dies intestate with a distributable estate of $90,000 and is survived by one child and two grandchildren from a deceased son and one grandchild from a deceased daughter, the surviving child takes $30,000, the deceased daughter's child takes $30,000, and the deceased son's two children take $15,000 each. Under a per capita at each generation system of representation, all three grandchildren would receive $20,000 each, with the surviving child receiving $30,000.

The rights of adopted children and non-marital children and their natural parents for the purposes of intestate succession have been modified. Under both the revised and prior laws, an adopted child is the child of an adopting parent or parents and not of the natural parents with the exception of the case of an adoption of a child by the spouse of either natural parent. In such a case, the adoption has no effect on the relationship between the child and that natural parent or the right of the child or descendant of the child to inherit from or through the other natural parent.[44] The effect of this exception is that the adopted child can inherit from three persons—the natural parents and the adopting parent. The non-marital child who has established parentage generally inherits by, through, and from his or her natural parents. The relationship of parent and child, as far as a non-marital child is concerned, is still established under the Uniform Parentage Act.[45] The change in the law is that in the case of any child, adopted, non-marital, or otherwise, either natural parent or the kindred of either natural parent cannot inherit from and through that child unless that natural parent has openly treated the child as the parent's and has not refused to support the child.[46] Not refusing to support the child refers to the time period during which the parent has a legal obligation to support the child.[47] The effect of this statute extends beyond the case of an adopted or nonmarital child. It means that all biological parents, or the kindred of either, are subject to

43. N.D. CENT. CODE § 30.1-04-06 (Supp. 1995) (effective Jan. 1, 1996). This statute describes the North Dakota system of representation as follows:

> If representation is called for by this title, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

Id.

44. *Id.* § 30.1-04-09(1).

45. *Id.* § 30.1-04-09(3). The Uniform Parentage Act lists a number of presumptions that can be used to prove paternity. N.D. CENT. CODE § 14-17-04 (1991 & Supp. 1995). This statute of the Act has been held to be constitutional. B.H. v. K.D., 506 N.W.2d 368, 375 (N.D. 1993).

46. N.D. CENT. CODE § 30.1-04-09(3) (Supp. 1995) (effective Jan. 1, 1996).

47. UNIF. PROB.CODE § 2-114 (1990) (amended 1993).

the requirement of openly treating their children as their own and supporting their children if they want to inherit from or through their children.[48]

The law of advancement is treated in the chapter on intestate succession since it applies only in cases of intestate succession. The revised law like the prior law, continues to require that in order for an advancement made by an individual in his or her lifetime to be taken into account in the distribution of that individual's estate, the advancement must be declared or acknowledged in writing by that individual or the heir. The only change in the revised law is that an advancement can be taken into account, not only if a person dies wholly intestate, but also partially intestate.[49]

III. ELECTIVE SHARE

The revised North Dakota elective share law retains the prior law's basic structure for computing that share but at the same time makes some significant changes and modifications. The highlights of these changes include the following: First, the surviving spouse is now entitled to take an elective share of one-half of the augmented estate as compared to one-third of the augmented estate under the prior law.[50] Second, the surviving spouse is guaranteed a basic supplemental share of $50,000.[51] Third, there are now four Segments of the augmented estate: (Segment One) decedent's net probate estate; (Segment Two) decedent's non-probate transfers to others; (Segment Three) decedent's non-probate transfers to the surviving spouse; and (Segment Four) surviving spouse's property and non-probate transfers to others.[52] The

48. WAGGONER ET AL., *supra* note 34, at 135-36.

49. N.D. CENT. CODE § 30.1-04-10 (Supp. 1995) (effective Jan. 1, 1996).

50. N.D. CENT. CODE § 30.1-05-01(1) (Supp. 1995) (effective until Jan. 1, 1996); N.D. CENT. CODE § 30.1-05-01(1) (Supp. 1995) (effective Jan. 1, 1996). The procedure for filing to take the elective share is basically the same as under the prior law. A petition must be filed within the nine months after the date of the decedent's death, or within six months after the probate of decedent's will, whichever limitation expires later. *Id.* Under the revised law, an agent with a durable power of attorney, guardian, or conservator of the surviving spouse may exercise the surviving spouse's right of election. *Id.* In the case of an incapacitated spouse, the court will set aside the portion of the elective share and supplemental elective share amounts and appoint a trustee to administer trust property for the support of the surviving spouse. N.D. Cent. Code § 30.1-05-06(2) (Supp. 1995) (effective January 1, 1996).

51. N.D. CENT. CODE § 30.1-05-01(2) (Supp. 1995) (effective Jan. 1, 1996). This supplemental share amount is payable from recipients of decedent's probate estate and decedent's nonprobate transfers to persons other than the surviving spouse. *Id.* Only if these recipients continue to have property which was listed in the computation of the augmented estate, and which was not needed to satisfy the elective share of one-third of the augmented estate will the surviving spouse be able to take his or her supplemental elective share. *Id.* The order of priority for paying the supplemental elective share is the same as that used to satisfy the elective share. *Id. See infra*, part III.B.

52. N.D. CENT. CODE § 30.1-05-02(2) (Supp. 1995) (effective Jan. 1, 1996).

latter two Segments were treated as a single Segment under prior law usually under the title of decedent's transfers to the surviving spouse and that spouse's transfers to others.[53] Fourth, in computing the amount of surviving spouse's property owned at death, which is includable in Segment Four of the augmented estate, the revised law requires that the value of all of the spouse's property be included whether or not the property was gratuitously derived from the decedent.[54] Under prior law, only the surviving spouse's property gratuitously derived from the deceased was included in the augmented estate.[55] The revised law relieves the surviving spouse of making this complex computation and of being subjected to a presumption that all property owned by the surviving spouse had been derived from the decedent except to the extent that the surviving spouse established that it was derived from another source.[56] Fifth, some of decedent's non-probate transfers which were not includable in the augmented estate under the prior law are now required to be added in the augmented estate.[57] One such non-probate transfer is the exercise of a presently exercisable general power of appointment.[58] Sixth, there are now three funds for satisfying the spouse's elective share.[59] Under the prior law, there were two funds—first, the surviving spouse's property and, second, other recipients' share of the probate estate and the decedent's transfers of non-probate property.[60] Under the revised law, the three funds to be used in satisfying the elective share amount and the order in which they are applied is as follows: (Fund #1) the amounts which pass to the surviving spouse under the probate estate and the amounts which passed by virtue of decedent's nonprobate transfers to the surviving spouse and the amounts which are owned or transferred by the surviving spouse; (Fund #2) the amounts of decedent's non-probate transfers to third

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53. N.D. CENT. CODE § 30.1-05-02(2) (Supp. 1995) (effective until Jan. 1, 1996). The prior law stated:

> The value of the property owned by the surviving spouse at the decedent's death, plus the value of the property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includable in the spouse's augumented estate if the surviving spouse had predeceased the decedent, to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth.

Id.

54. N.D. CENT. CODE § 30.1-05-02(2)(d) (Supp. 1995) (effective Jan. 1, 1996).
55. N.D. CENT. CODE § 30.1-05-02(2) (Supp. 1995) (effective until Jan. 1, 1996).
56. *See* N.D. CENT. CODE § 30.1-05-02(d)(1) (Supp. 1995) (effective Jan. 1, 1996).
57. *Id.* § 30.1-05-02 (2)(b).
58. *Id.* § 30.1-05-02(2)(b)(l).
59. *Id.* § 30.1-05-03.
60. N.D. CENT. CODE § 30.1-05-07(1) (Supp. 1995) (effective until Jan. 1, 1996).

parties other than the surviving spouse and other than the property which passed during the two-year period next preceding the decedent's death; and (Fund #3) the amounts of such property which passed during the two-year period next preceding the decedent's death.[61]

These major revisions of the elective-share law are aimed at fulfilling two goals.[62] One goal is to implement the partnership or marital-sharing theory of marriage. The North Dakota law gives a surviving spouse a percentage of half the augmented estate while the U.P.C. proposes a sliding scale percentage which gives the surviving spouse half the augmented estate after 15 years of marriage.[63] The second goal is to implement the support theory based on the mutual duty of the spouses to support each other during their lifetimes and then for the deceased spouse to support the surviving spouse.[64] In some situations, one half of the augmented estate may be insufficient to provide minimum support for the surviving spouse. To meet this need of providing minimum support, the U.P.C. introduced the concept of providing, where possible, a supplemental elective share of $50,000 to the surviving spouse.[65] The North Dakota Legislature has enacted a provision providing the supplemental elective share.[66]

A. AUGMENTED ESTATE

North Dakota law gives spouses the right to take one-half of the other spouse's augmented estate no matter how soon after the marriage a spouse might die.[67] This approach recognizes what appears to be a full partnership from the beginning of the marriage.[68] The U.P.C., on the other hand, makes a distinction between short term marriages and long term marriages. For example, surviving spouses married for five years are entitled to only 15 percent of the augmented estate.[69] A full eco-

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61. *Id.* § 30.1-05-03.

62. *See, e.g.*, John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303 (1987) (addressing various problems concerning elective-share law).

63. *See infra* note 69 (providing the text of the sliding scale).

64. UNIF. PROB. CODE art. II, pt. 2 gen. cmt. (support theory) (1990) (amended 1993).

65. *See infra* notes 67-69 and accompanying text (discussing in part the supplemental elective share).

66. N.D. CENT. CODE § 30.1-05-01(2) (Supp. 1995) (effective Jan. 1, 1996).

67. *Id.* § 30.1-05-01(1).

68. UNIF. PROB. CODE art. II, pt. 2 gen. cmt. (partnership theory) (1990) (amended 1993). There was some concern at a legislative hearing in 1993, about legislators voting in favor of an elective share of one-half of the augumented estate. One Senator questioned whether people are getting married just for the estate. *See* 1993 Senate Standing Comm. Minutes, H.B. No. 1111, 53d Leg. Sess. (remarks of Senator Marks).

69. UNIF. PROB. CODE § 2-202(a) (1990) (amended 1993). The U.P.C. implements an accrual type of elective share by adjusting the elective share entitlements to the length of the marriage. The longer the marriage the larger the elective share percentage and the more each spouse's individual

nomic partnership is not recognized until the surviving spouse has been married for 15 years, and at that time, that spouse is then entitled to 50 percent of the augmented estate.[70] Likewise, in reducing the elective share by the property owned or transferred by the surviving spouse as listed in Segment Four (property owned or transferred by the surviving spouse) of the augmented estate, North Dakota law requires the entire amount listed in Segment Four to be used to reduce the surviving spouse's elective share.[71] From the outset of the marriage, this revised law considers all the property listed in Segment Four to be marital property and not individual property.[72] Again, North Dakota law appears to have adopted a full economic partnership from the beginning of the marriage. On the other hand, the U.P.C. does not require the entire amount of property owned or transferred by the surviving spouse includable in Segment Four to be used to reduce the elective share until the spouses have been married for 15 years or longer.[73] For example, a

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property becomes marital property. *Id.* This sliding scale approach has been adopted in Minnesota and Montana. MINN. STAT. ANN. § 524.2-202 (Supp. 1995); MONT. CODE ANN. § 72-2-221 (1995).

70. *Id.* The U.P.C.'s provision states:

> The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this Part, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:
>
> | If the decedent and the spouse were married to each other: | The elective-share percentage is: |
> |---|---|
> | Less than 1 year | Supplemental Amount Only. |
> | 1 year but less than 2 years | 3% of the augmented estate. |
> | 2 years but less than 3 years | 6% of the augmented estate. |
> | 3 years but less and 4 years | 9% of the augmented estate. |
> | 4 years but less than 5 years | 12% of the augmented estate. |
> | 5 years but less than 6 years | 15% of the augmented estate. |
> | 6 years but less than 7 years | 18% of the augmented estate. |
> | 7 years but less than 8 years | 21% of the augmented estate. |
> | 8 years but less than 9 years | 24% of the augmented estate. |
> | 9 years but less than 10 years | 27% of the augmented estate. |
> | 10 years but less than 11 years | 30% of the augmented estate. |
> | 11 years but less than 12 years | 34% of the augmented estate. |
> | 12 years but less than 13 years | 38% of the augmented estate. |
> | 13 years but less than 14 years | 42% of the augmented estate. |
> | 14 years but less than 15 years | 46% of the augmented estate. |
> | 15 years or more | 50% of the augmented estate. |

Id.

71. N.D. CENT. CODE § 30.1-05-03(1) (Supp. 1995) (effective Jan. 1, 1996).

72. *Id.* § 30.1-05-02(c), (d).

73. UNIF. PROB. CODE § 2-209(a)(2) (1990) (amended 1993).

surviving spouse who has been married for five years will only have an amount equal to 30 percent or twice the augmented estate percentage put in Fund # 1 and used to reduce his or her elective share.[74] Only 30 percent of the surviving spouse's property includable in Segment Four will be considered marital property as compared to individual property which is still considered not part of the economic partnership. Under the U.P.C., only when the augmented estate percentage is 50 percent is the property owned or transferred by the surviving spouse at death of the other spouse considered to be full marital property.

The seeming reluctance of the U.P.C. and the readiness of the North Dakota law to give full partnership to the spouses at the beginning of the marriage may be understood by the fact that the U.P.C. requires that more of decedent's non-probate transfers to persons other than the surviving spouse (as listed in Segment Two) be included in the augmented estate. For example, in Segment Two, the U.P.C. and the revised North Dakota law include in the augmented estate, property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment.[75] The revised law, however, requires only those such powers to be included that were "created by the decedent during marriage," whereas the U.P.C. requires all such powers to be included despite when they were created or by whom they were created.[76] Similarly, the U.P.C. and the revised law both include in Segment Two the decedent's fractional interest in property, held by the decedent in joint tenancy with the right of survivorship. Under the U.P.C., the amount included is the full value of decedent's fractional interest, despite when the interest was created or by whom the interest was created;[77] under the revised law, the amount included is the value of decedent's fractional interest "contributed by the decedent during the marriage."[78] In addition, the U.P.C. includes all of Segment Two in the

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74. *Id.* In the case of spouses who are married to each other more than five years but less than six years, the elective share percentage for a five-year marriage is 15%. *Id.* § 2-202(a). If the decedent's net probate estate passing to persons other than the surviving spouse is $400,000 and the surviving spouse's assets is $200,000 under U.P.C. § 2-209(a)(2), the augmented estate is $600,000 and the surviving spouse's elective-share amount is $90,000 (15% of $600,000). To satisfy the augmented estate, only twice the amount of the elective-share percentage is deducted from the $90,000 (30% of $90,000) or $27,000. The remaining elective-share amount of $63,000 will have to be made up pro rata from the persons receiving the decedent's net probate estate. *See id.* art. II, pt. 2 gen. cmt. (the support theory).

75. *See infra* note 84 and accompanying text (discussing exercisable powers held immediately before death).

76. *Compare* N.D. CENT. CODE § 30.1-05-02(2)(b)(1)(a) (Supp. 1995) (effective Jan. 1, 1996) *and* UNIF. PROB. CODE § 2-205(1)(i) (1990) (amended 1993).

77. UNIF. PROB. CODE § 2-205(1)(ii).

78. N.D. CENT. CODE § 30.1-05-02(b)(1)(b) (Supp. 1995) (effective Jan. 1, 1996). For example, under both the U.P.C. and the revised law, if the decedent contributed $50,000 toward the purchase of Blackacre and his daughter also contributed $50,000 toward the purchase of Blackacre, with the

augmented estate and proceeds of insurance, including accidental death benefits on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds.[79] The North Dakota Legislature did not adopt this provision.[80] In North Dakota, either spouse may come into the marriage with any of these three types of property and not have them included in one's augmented estate. Thus, more of a North Dakota spouse's property is shielded from being brought into the augmented estate than a spouse whose elective share rights are regulated by a state adopting all these U.P.C. provisions.

The basic structure of what should be included in the augmented estate remains essentially the same under the revised North Dakota law. The type of property transfers originally included in the augmented estate were those considered to be the typical types used by one spouse to disinherit the other spouse. Once certain types were denominated, then other types of transfers were resorted to in order to keep that property beyond the reach of a surviving spouse. The revised law includes more types of transfers and refines some provisions to expand or more clearly define other types that should be includable in the augmented estate. The theory is that without such improvement, the need of which has been experienced during the first 20 years of states dealing with this elective share law, surviving spouses will be denied meaningful support.

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property being put in their names as joint tenants with the right of survivorship, $50,000 would be included in the augmented estate. *See id.*

79. UNIF. PROB. CODE § 2-205(1)(iv).

80. In fact, the new law explicitly states that life insurance, accident insurance, pension, profit-sharing, retirement, and other benefit plans payable to persons other than the decedent's surviving spouse or the decedent's estate are excluded from the decedent's nonprobate transfers. N.D. CENT. CODE § 30.1-05-02 (2)(d)(3) (Supp. 1995) (effective Jan. 1, 1996). As a result of this provision, anyone in North Dakota wishing to disinherit a spouse may, at any time, before or after marriage, buy insurance for, or make benefit plans payable to persons other than the surviving spouse, and rest assured that such amounts payable under these plans will be excluded from the augumented estate. UNIF. PROB. CODE § 2-205(1)(iv).

The augmented estate consists of four Segments which, when added together, constitute the total augmented estate.[81] Fifty percent of the total augmented estate is the elective share to which every surviving spouse of a decedent who dies domiciled in North Dakota is entitled to receive. The four segments of the augmented estate are as follows:

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81. COMPOSITION OF AUGMENTED ESTATE

Segment One: Value of decedent's net probabte estate. $.....
Segment Two: Value of decedent's non-probate Transfers to others.
Part One: Property that passed outside probate at decedent's death.
1. Property subject to decedent's presently exercisable general power of appointment. $.....
2. Decedent's fractional interest in jointly held property contributed by decedent during the marriage. $.....
3. Decedent's ownership interest in property held in POD, TOD, or co-ownership, with the right of survivorship. $.....

Part Two: Value of property transferred during marriage.
1. Property decedent irrevocably transferred. Retaining right to possession, employment, or income interest. $.....
2. Property decedent transferred retaining power of appointment or right to revoke exercisable by decedent alone or in conjunction with any other person or by a nonadverse party. $.....

Part Three: Value of property transferred by decedent during marriage and during a two year period next preceding decedent's death.
1. Property that would have been included in decedent's augmented estate, had it not been terminated before decedent's death. $.....
2. Property transferred to extent transfers exceed $10,000 to any one donee per year. $.....

Segment Three: Value of property surviving spouse receives by reason of decedent's death; decedent's nonprobate transfers to surviving spouse. $.....

Segment Four: Value of surviving spouse's separate property; spouse's assets and transfers to others. $.....

Total Augmented Estate $.....

Note: The elective share is 50% of the augmented estate.

1. *Segment One*

Segment One consists of the value of decedent's net probate estate which is the gross estate reduced by funeral and administration expenses, homestead, family allowances, exempt property, and enforceable claims.[82] If an individual receives a devise of property that is subjected to the homestead allowance, that person will be held accountable under the augmented estate for the commuted value of the property.[83]

2. *Segment Two*

Segment Two consists of the value of decedent's nonprobate transfers that passed outside the decedent's probate estate. Not all such transfers are included, only the specified types. Segment Two has been revised and is organized under three parts.

Part One of Segment Two consists of three types of property that passed at decedent's death to persons other than decedent's estate or decedent's surviving spouse. The first type is property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment created by the decedent during the marriage.[84] The second type of property is decedent's fractional interest in property, held by the decedent in joint tenancy with the right of survivorship.[85] The revised law defines "fractional interest in property held in joint tenancy with the right of survivorship" as follows:

> Fractional interest in property held in joint tenancy with the right of survivorship, whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who

82. N.D. CENT. CODE § 30.1-05-02(2)(a) (Supp. 1995) (effective Jan. 1, 1996).

83. For discussion of homestead, family allowances, exempt property, and enforceable claims, see *infra* notes 116-124 and accompanying text. N.D. CENT. CODE § 30.1-05-02(4). This statute also applies to determining the value of all property included in the augmented estate and states that the value of property includes the commuted value of any present or future interest, as well as the commuted value of amounts payable under any trust, life insurance, settlement option, annuity contract, public or private pension, disability compensation, death benefit, or retirement plan, or similar arrangement, exclusive of the federal security system. Id. If property can be included in either one or more Segments of the augmented estate, the property is included under the provision yielding the highest value, but under any one, and only one of the overlapping provisions if they all yield the same value. N.D. CENT. CODE § 30.1-05-02(5) (Supp. 1995) (effective Jan. 1, 1996).

84. N.D. CENT. CODE § 30.1-05-02(2)(b)(1)(a) (Supp. 1995) (effective Jan. 1, 1996). The amount included is the value of the property subject to the power to the extent that the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise. *Id.*

85. *Id.* § 30.1-05-02(2)(b)(1)(b).

survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants.[86]

The last type of property listed is the decedent's ownership interest in property or accounts held in POD (payable on death), TOD (transfer on death), or co-ownership registration with the right of survivorship. Only the value of decedent's ownership interest is included.[87] This ownership interest may have been created before or during the marriage.

Part Two of Segment Two consists of two types of property which the decedent transferred during marriage. The first type is "[a]ny irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or the income from, the property, if and to the extent that the decedent's right terminated at or continued beyond the decedent's death."[88] The second type of property is "[a]ny transfer in which the decedent created a power over the income or principal of the transferred property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, for the decedent's estate."[89]

Part Three of Segment Two includes in the augmented estate any property that the decedent transferred during the marriage and during the two years preceding his or her death.[90] In one section of Part Three of Segment Two, the amount included is the value of the property transferred to the extent that aggregate transfers exceeded $10,000.[91] Under prior law, the amount included was the value of the property

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86. *Id.* § 30.1-05-02(1)(a)(2). For example, if three persons were joint tenants with right of survivorship in real property, each one's fractional interest would be one-third. *Id.* However, the amount included is the value of the decedent's fractional interest contributed during marriage. *Id.* § 30.1-05-02(2)(b)(1)(b).

87. *Id.* § 30.1-05-02(2)(b)(1)(c). If a mother and daughter were registered as co-owners of a joint checking account, with the mother contributing 60% of the funds in the account and owning the same percentage at death, then 60% of the value of the account passing to the daughter at the mother's death is included in the mother's augmented estate. UNIF. PROB. CODE § 2-205 (1990) (amended 1993).

88. *Id.* § 30.1-05-02(2)(b)(2)(a). "[T]he amount included is the value of the fraction of the property to which the decedent's right related . . . ." *Id.* If before death and during marriage a father created an irrevocable intervivos trust with income to the father for life and remainder to his daughter, then at the father's death, the value of the corpus of the trust is included in the father's augmented estate. UNIF. PROB. CODE § 2-205 (1990) (amended 1993). Other, more complex examples involving retained unitrust interests for a term, personal residence trusts, retained annuity interests for a term, and commercial annuities are found in this comment. *Id.*

89. N.D. CENT. CODE § 30.1-05-02 (2)(b)(2)(b) (Supp. 1995) (effective Jan. 1, 1996) (Supp. 1995). "[T]he amount included is the value of the property subject to the power . . . ." *Id.* If, before death and during marriage, a mother created a revocable intervivos trust with income to her son for life and remainder to her daughter, then at the mother's death, the value of the corpus of the trust which was not revoked by the mother during her lifetime is included in the mother's augmented estate. Other, more complex situations involving the exercise of joint powers in non-adverse parties are found in the Uniform Probate Code Comment, section 2-205 (1990) (amended 1993).

90. *Id.* § 30.1-05-02(b)(3).

91. *Id.* § 30.1-05-02(b)(3)(b).

transferred to the extent that aggregate transfers exceeded $3,000.[92] In another section of Part Three of Segment Two, the revised law addresses the problem of interests which terminate immediately before death and thus are not brought within the augmented estate under the other provisions of Segment Two. The revised law includes in the augmented estate any property that passed during marriage and during the two-year period preceding the decedent's death as a result of termination of a right or interest in, or power over, property that would have been included in Part One or Part Two of Segment Two if the right, interest, or power had not terminated until the decedent's death.[93] The amount included is the value of the property that would have been included under Part One and Part Two, except that the property is valued at the time that the right, interest, or power terminated.[94]

Like prior law, all these nonprobate transfers to be included in Segment Two must be gratuitous and made without the written joinder or the written consent of the surviving spouse.[95] To the extent that the decedent received adequate and full consideration in money or money's worth, the value of any property is excluded from the decedent's nonprobate transfers.[96]

3. *Segment Three*

As stated above, Segment Three and Segment Four consist of what the prior law described as the value of the property, owned by the surviving spouse at the decedent's death other than what was received as probate property, "plus the value of property transferred by the spouse at any time during the marriage to any person other than the decedent which would have been includable in the spouse's augmented estate if the surviving spouse had predeceased the decedent."[97] The revised law divides the listing of spousal property into two Segments because it follows the structure of the U.P.C. which needs two categories of property since it does not use all marital property to satisfy the spouse's elective share except in the case of a couple who have been married for

92. N.D. CENT. CODE § 30.1-05-02(1)(d) (Supp. 1995) (effective until Jan. 1, 1996).

93. *Id.* § 30.1-05-02 (2)(b)(3)(a).

94. *Id.* Consider a case in which the decedent before death and during marriage created an irrevocable intervivos trust, with the income to himself for 10 years and then the corpus to his son. Decedent died 11 years after the trust was created, survived by his spouse to whom he was married at the time the trust terminated. According to a U.P.C. comment, the full value of the corpus at the date of the trust's termination is included in the augmented estate. *See* UNIF. PROB. CODE § 2-205 cmt. (1990) (amended 1993). Had the deceased income interest not terminated until the deceased's death, the full amount of the corpus would have been included under Part One of Segment Two. *Id.*

95. N.D. CENT. CODE § 30.1-05-02(3) (Supp. 1995) (effective Jan. 1, 1996).

96. *Id.*

97. *Id.* § 30.1-05-02(2).

15 years or longer.[98] Under the revised law, since all spousal property constitutes Fund #1 to be used to satisfy the spouse's elective share, these two Segments could have been combined. However, they will be treated as two separate Segments in this article to reflect the separate treatment they are given in the revised law.

Under Segment Three, the value of decedent's nonprobate transfers that passed at the decedent's death to the surviving spouse, is included in the augmented estate. The revised law lists a few types of these nonprobate transfers: 1) the decedent's fractional interest in property held as joint tenant with the surviving spouse as surviving joint tenant; 2) the decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship with the surviving spouse as a surviving co-owner; and 3) proceeds of insurance on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent that the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds.[99] Any type of nonprobate property of the kind includable in Part One or Part Two of Segment Two will be included in Segment Three if it passes on the decedent's death to the surviving spouse.[100]

4. *Segment Four*

Under Segment Four, the augmented estate consists of the remaining property that passes to the surviving spouse by reason of the decedent's death and is owned by the surviving spouse at decedent's death other than that accounted for in Segments One and Three.[101] Included are the surviving spouse's fractional interest in property held in joint tenancy with the right of survivorship and ownership interest in property or accounts held in co-ownership registration with the right of survivorship.[102] Not included are the spouse's rights to homestead, family allowance, exempt property, or payments under the federal social security system.[103] Like the prior law, the revised North Dakota law also adds into the augmented estate the property that would have been

98. *Compare id.* § 30.1-05-02(2)(b)(2),(3) *and* UNIF. PROB. CODE § 2-209(a)(2) (1990) (amended 1993).

99. N.D. CENT. CODE § 30.1-05-02(2)(c).

100. *Id.* § 30.1-05-02(2)(c).

101. *Id.* § 30.1-05-02(2)(d).

102. *Id.* § 30.1-05-02(2)(d)(1)(a), (b). The value of these interests is determined immediately before the decedent's death if the decedent was then a joint tenant or a co-owner of the property or accounts. *Id.* § 30.1-05-02(2)(d)(2).

103. *Id.* § 30.1-05-02 (2)(d)(1)(c). *See infra* note 117 and accompanying text.

included in the surviving spouse's augmented estate as nonprobate transfers to others, had the spouse been the decedent.[104]

The elective share of the surviving spouse is one half of the sum of the total amounts in Segments One, Two, Three, and Four and constitutes the augmented estate.[105] The revised law stipulates three funds to be used to satisfy the elective share.[106] Fund #1 is used first to satisfy the elective share and consists of the amounts received from the net probate estate in Segment One and the amounts received as listed in Segments Three and Four.[107] If the elective share is not satisfied, then Fund #2 is applied to satisfy the unsatisfied balance of the elective-share amount. Fund #2 consists of the amounts included in the decedent's net probate estate in Segment One and in the decedent's nonprobate transfers to others in Parts One and Two of Segment Two.[108] If the elective share is still not satisfied, then Fund #3 is applied. Fund #3 consists of the remaining nonprobate transfers in Part Three of Segment Two.[109] The decedent's nonprobate transfers to others made during the two-year period next preceding the decedent's death are reserved until the amounts in Fund #2 are exhausted in satisfying the elective-share amount.[110] The amounts in Funds #2 and #3 are apportioned equitably among the respective recipients in proportion to the value of their interests in the Funds.[111]

B. SUPPLEMENTAL ELECTIVE SHARE

A surviving spouse is entitled to a supplemental elective share when the sum of the following amounts is less than $50,000: 1) the amounts in Segments Three and Four in the augmented estate; 2) the amounts in Segment One of the augmented estate which pass or have passed to the surviving spouse by testate or intestate succession; and 3) that part of the elective-share amounts payable to the surviving spouse under Segments One and Two in the augmented estate.[112] In other words, if the surviving spouse's property which he or she owns and the property received

104. N.D. CENT. CODE § 30.1-05-02(2)(d)(2) (Supp. 1995) (effective January 1, 1996). This property, not including the spouse's fractional and ownership interests is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account. *Id.*

105. *See supra* notes 82-104 and accompanying text.

106. N.D. CENT. CODE § 30.1-05-03(1), (2) (Supp. 1995) (effective Jan. 1, 1996).

107. *Id.*

108. *Id.* § 30.1-05-03(2).

109. *Id.* § 30.1-05-03(3).

110. *Id.* Under prior law, the amounts of all decedent's nonprobate transfers were considered as one fund and applied to satisfy the elective-share amount in the event it was unsatisfied after the property of the surviving spouse listed in the augumented estate was applied. N.D. CENT. CODE § 30.1-05-07(2) (Supp. 1995) (effective until Jan. 1, 1996).

111. N.D. CENT. CODE § 30.1-05-03(2), (3) (Supp. 1995) (effective January 1, 1996).

112. *Id.* § 30.1-05-01(2).

from recipients of the decedent's nonprobate transfers to satisfy the elective share do not add up to $50,000, then the surviving spouse is entitled to the difference between $50,000 and total amount owned or received from others.[113]

C. WAIVER OF RIGHT TO ELECTIVE SHARE

The revised law dealing with the right to waive the elective share and other rights adds a provision which is not included in the prior law or the Uniform Premarital Agreement Act.[114] This new provision states that a surviving spouse's waiver is not enforceable if the surviving spouse proves that the "waiver, if given effect, would reduce the assets or income available to the surviving spouse to an amount less than those allowed for persons eligible for medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need."[115]

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113. *Id.* In this context, the word "owns" includes the property that would have been included in the surviving spouse's nonprobate transfers to others had the spouse been the decedent. *Id.* The following is an example of the method used to compute the supplemental elective share:

After A's death, B, [A's surviving spouse] married C. Five years later, B died, survived by C. B's will left nothing to C, and B made no nonprobate transfers to C. B made no nonprobate transfers to others as defined in Section 2-205.

The augmented estate is:

(1) B's net probate estate	$ 60,000
(2) B's nonprobate transfers to others	0
(3) B's nonprobate transfers to C	0
(4) C's assets and nonprobate transfers to others	$ 10,000
Augmented Estate	$ 70,000

The elective-share percentage is 50%. This means that C's elective-share amount is $30,000 (50% of $70,000).

The remaining $35,000 elective-share amount would come from B's net probate estate.

Application of Section 30.1-05-01(2) shows that C is entitled to a supplemental elective-share amount.

C's assets and nonprobate transfers to others	$10,000
B's nonprobate transfers to C	0
Elective-share amount payable from decedent's probate estate	$35,000
Total	$45,000

The above calculation shows that C is entitled to a supplemental elective-share amount of $5,000 ($50,000 minus $45,000). The supplemental elective-share amount is payable entirely from B's net probate estate.

The end result is that C is entitled to $40,000 ($35,000 + $5,000) by way of elective share from B's net probate estate (and nonprobate transfers to others, had there been any). Forty thousand dollars is the amount necessary to bring C's $10,000 in assets up to $50,000. *See* UNIF. PROB. CODE, Art. II, Pt. 2 Gen. cmt. (1990) (amended 1993).

114. N.D. CENT. CODE § 14-03.1-06 (1991); *id.* § 30.1-05-04 (Supp. 1995) (effective until Jan. 1, 1996); *id.* § 30.1-05-07 (Supp. 1995) (effective Jan. 1, 1996).

115. N.D. CENT. CODE § 30.1-05-07(2) (Supp. 1995) (effective Jan. 1, 1996).

IV. HOMESTEAD, FAMILY ALLOWANCE, AND EXEMPT PROPERTY

In addition to the elective share or the supplemental elective share, the surviving spouse is also entitled to homestead estate, family allowance, and exempt property. Minor children may also be recipients of these family benefits.

In North Dakota, the homestead estate is available only to the surviving spouse or minor children if the decedent had title to real property which constituted a homestead.[116] The surviving spouse is entitled to the homestead estate for life or until he or she marries again; if there is no surviving spouse, the decedent's minor children may receive the homestead estate until the youngest attains majority.[117] The real property constituting the homestead may descend or be distributed to the surviving spouse and decedent's heirs in the direct descending line even though all decedent's debts are not fully paid.[118] The U.P.C., on the other hand, proposes a flat award of $15,000 homestead allowance to each surviving spouse or, if none, to each minor child and each dependent child of the decedent, divided by the number of minor and dependent children of the decedent.[119]

The revised law increases the family allowance from $6,000 to $18,000 which may be disbursed in periodic payments not exceeding $1,500 per month for one year.[120] The family allowance is payable to the decedent's surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent.[121]

With respect to exempt property, the revised law increases the allowance to the surviving spouse from $5,000 to $10,000.[122] If there is no surviving spouse, the decedent's minor children and children who were in fact being supported by the decedent are entitled jointly to the $10,000 exempt property allowance.[123] The prior law allowed all the

116. N.D. CENT. CODE § 30-16-02 (1976). The homestead consists of the land upon which the decedent resided, and the dwelling house on that land in which the decedent resided, with all its appurtenances, and all other improvements on the land, provided that the total does not exceed $80,000 in value, over and above liens or encumbrances or both. N.D. CENT. CODE § 47-18-01 (1978 & Supp. 1995).

117. N.D. CENT. CODE § 30-16-02 (1976).

118. N.D. CENT. CODE § 30-16-04 (Supp. 1995) (effective Aug. 1, 1995).

119. UNIF. PROB. CODE § 2-402 (1990) (amended 1993).

120. N.D. CENT. CODE § 30.1-07-03(1) (Supp. 1995) (effective Jan. 1, 1996).

121. *Id.* § 30.1-07-02(1).

122. *Id.* § 30.1-07-01.

123. *Id.*

decedent's children, both minor and adult, to select exempt property if there was no surviving spouse.[124]

V. WILLS

The revised law makes no major changes in the chapter on wills but there are revisions, especially in the following areas: 1) revocation and revival of wills; 2) separate documents disposing of items of tangible property; and 3) testamentary additions to trusts. Furthermore, the chapter dealing with the spouse and children who are not provided for in wills is substantially revised.

A major change proposed by the U.P.C. that was not adopted in North Dakota is the adoption of a "dispensing power" statute that allows a court to excuse a harmless error in complying with the formal requirements for executing or revoking a will.[125] The U.P.C. proposed the change as part of its approach to unify the law of probate and nonprobate transfers.[126] The dispensing power law or doctrine of substantial compliance or principle of harmless error, has long been applied to sustain nonprobate transfers despite defective compliance with the formal requirements for nonprobate transfers.[127] The U.P.C. dispensing power provision would mean, for example, that if a person misunderstood the formal requirements for executing a will and had only one witness sign the will, a court could uphold the will if the proponent of the writing established by clear and convincing evidence that the person intended the document to be his or her will.[128] Such a provision could also allow a court to honor a lay person's intent to revoke and reexecute a will in those types of situations where the person blackens out one name in a devise on a will and replaces it with another name.[129] To give some relief in the latter type of situations, American courts rely on the doctrine of dependent relative revocation.[130]

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124. N.D. CENT. CODE § 30.1-07-01 (Supp. 1995) (effective until Jan. 1, 1996).

125. UNIF. PROB. CODE § 2-503 (1990) (amended 1993). Manitoba, Canada has adopted the doctrine of substantial compliance that allows a court, if it is satisfied that a document embodies the testamentary intentions of a deceased to uphold that document as a will, notwithstanding that the document was not executed according to the requirements of the wills act. R.S.M., Wills Act, Section 23 (1983). The substantial compliance doctrine can also be utilized in cases of revocation or revival of wills. *Id.* Montana has adopted the U.P.C. dispensing power statute. MONT. CODE ANN. § 72-2-523 (1995).

126. UNIF. PROB. CODE art. II (Prefatory Note, Revisions) (1990) (amended 1993).

127. *Id.* § 2-503.

128. *Id.*

129. *See* N.D. CENT. CODE § 30.1-08-02 (Supp. 1995) (effective Jan. 1, 1996) (stating the formalities which must be followed in order to execute a valid attested or holographic will).

130. WILLIAM M. MCGOVERN JR. ET AL., WILLS, TRUSTS & ESTATES, INCLUDING TAXATION & FUTURE INTERESTS 217 (1988).

In the *Restatement (Second) of Property* (Donative Transfers),[131] the American Law Institute encourages courts to permit the probate of wills that substantially comply with the formalities of the statute of wills. Some courts have adopted the doctrine of substantial compliance.[132] In *In Re Alleged Will of Ranney*,[133] the testator signed his will but both witnesses instead of signing the will, signed the self-proving affidavit which was at the end of the document.[134] These signatures did not conform to the requirements of the statute of wills.[135] The court applied the doctrine of substantial compliance and remanded the case to the trial court with the instructions that "if . . . the [court] is satisfied that the execution of the will substantially complied with the statutory requirements, it may reinstate the judgment of the Surrogate admitting the will to probate."[136] The court said: "It would be ironic to insist on literal compliance with statutory formalities when that insistence would invalidate a will that is the deliberate and voluntary act of the testator. Such a result would frustrate rather than further the purpose of the formalities."[137] The revised North Dakota law added a provision to the statute setting forth the form of the self-proved affidavit to the effect that "a signature affixed to [this] affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution."[138] Recently, in *Matter of Estate of Voeller*,[139] the Supreme Court of North Dakota had an opportunity to apply the doctrine of substantial compliance.[140] In *Voeller*, two persons were present when the testator executed a codicil to his will but only one witness signed the codicil.[141] The court pointed out that the statute of wills clearly stated that a will "shall be signed by at least two persons."[142] Referring to a U.P.C.

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131. RESTATEMENT (SECOND) OF PROPERTY § 33.1 cmt. g. (1990) (discussing donative transfers).

132. In re Alleged Will of Ranney, 589 A.2d 1339, 1343 (N.J. 1991). *See, e.g.*, In re LaMont's Estate, 248 P.2d 1, 2-3 (Cal. 1952) (finding that the signature of witness substantially complied with execution requirements even if witness thought he was signing as executor).

133. 589 A.2d 1339 (N.J. 1991).

134. In re Alleged Will of Ranney, 589 A.2d 1339, 1339 (N.J. 1991).

135. *Id.* at 1343.

136. *Id.* at 1346.

137. *Id.* at 1344.

138. N.D. CENT. CODE § 30.1-08-04(3) (Supp. 1995) (effective Jan. 1, 1996).

139. 534 N.W.2d 24 (N.D. 1995).

140. In re Estate of Voeller, 534 N.W.2d 24, 24-25 (N.D. 1995).

141. *Id.*

142. *Id.* at 26. *See* N.D. CENT. CODE § 30.1-09.1-06 (Supp. 1995) (effective until Jan. 1, 1996). The pertinent section of the new anti-lapse section is as follows:

1. In this section:

a. "Alternative beneficiary designation" means a beneficiary designation that is expressly created by the governing instrument and, under the terms of the governing instrument, can take effect instead of another beneficiary designation on the happening of one or more events, including survival of the decedent or failure to survive the decedent, whether an event is expressed in condition-precedent, condition-subsequent, or any other form.

b. "Beneficiary" means the beneficiary designation under which the beneficiary must survive the decedent, and includes a class member if the beneficiary designation is in the form of a class gift and includes an individual or class member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent, but excludes a joint tenant of a joint tenancy with the right of survivorship and a party to a joint and survivorship account.

c. "Beneficiary designation" includes an alternative beneficiary designation and a beneficiary designation in the form of a class gift.

d. "Class member" includes an individual who fails to survive the decedent but who would have taken under a beneficiary designation in the form of a class gift had the individual survived the decedent.

e. "Stepchild" means a child of the decedent's surviving, deceased, or former spouse, and not of the decedent.

f. "Survivorship beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under section 30.1-09.1-02.

2. If a beneficiary fails to survive the decedent and is a grandparent, a descendant of a grandparent, or a stepchild of the decedent, the following apply:

a. Except as provided in subdivision d, if the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the decedent.

b. Except as provided in subdivision d, if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," "family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the decedent passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving decedents who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purpose of this subdivision, "deceased beneficiary" means a class member who failed to survive the decedent and left one or more surviving descendants.

c. For purposes of section 30.1-09.1-01, words of survivorship, such as in a beneficiary designation to an individual "if the individual survives me," or in a beneficiary designation to "my surviving children," are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

d. If a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by subdivision a or b, the designated beneficiary of the alternative beneficiary designation is entitled to take.

3. If, under subsection 2, substitute gifts are created and not superseded with respect to more than one beneficiary designation, and the beneficiary designations are alternative beneficiary designations, one to the other, the determination of which substitute gift takes effect is resolved as follows:

a. Except as provided in subdivision b, the property passes under the primary substitute gift.

b. If there is a younger-generation beneficiary designation, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

c. In this subsection:

(1) "Primary beneficiary designation" means the beneficiary designation that would have taken effect had all the deceased beneficiaries of the alternative beneficiary designations who left surviving descendants survived the decedent.

(2) "Primary substitute gift" means the substitute gift created with respect to the primary beneficiary designation.

(3) "Younger generation beneficiary designation" means a beneficiary designation that is to a descendant of a beneficiary of the primary beneficiary designation, is an alternative beneficiary designation with respect to the primary beneficiary designation, is a beneficiary designation for which a substitute gift is created, and would have taken effect had all the deceased

comment, the court noted that this statute represented the minimum requirements for the execution of will. The court stated: "[T]he signature of a single witness does not meet the 'minimum formalities.' We decline to accept 'substantial compliance' because it would decrease the 'minimum' formalities for a valid testamentary act."[143]

With regard to the revocation of wills, the revised law provides additional assistance in determining the legality of the physical act of revocation and in interpreting whether in a given case a subsequent will with no revocatory clause revokes a prior will by inconsistency. Under both the revised law and prior law, a will may be revoked by the physical acts of burning, tearing, canceling, obliterating, or destroying.[144] The revised law adds that "a burning, tearing, or canceling is a revocatory act on the will, whether or not the burn, tear, or cancellation touch any of the words on the will."[145] This revised provision reverses judicial decisions holding that cancellation is not valid unless the canceling words, marks or lines physically come in contact with some part of the written words on the will.[146]

On the question of inconsistent provisions in wills, the revised law sets forth a standard to determine whether the subsequent will containing no revocatory clause was meant to supplement or revoke a prior will. The standard is that if a subsequent will does not expressly revoke a previous will, it will revoke a prior will by inconsistency if the testator intended the subsequent will to replace rather than supplement the will.[147] In determining the intention of a testator, two presumptions can be utilized. One presumption is that the testator intended to have a subsequent will replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate.[148]

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beneficiaries who left surviving descendants survived the decedent except the deceased beneficiary or beneficiaries of the primary beneficiary designation.

(4) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation beneficiary designation.

143. *Voeller*, 534 N.W.2d at 26. The court would not apply an equitable remedy as requested by the personal representative who argued that the deceased had indisputedly signed the 1988 codicil and intended it to be effective. The personal representative argued that the only purpose of having witnesses to the will or codicil is to make certain that the testator actually signed the will or codicil. The court stated: "[B]ut an equitable remedy cannot avoid the meaning of an unambiguous statute . . . When all the wording of the statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Id.*

144. N.D. CENT. CODE § 30.1-08-07(2) (Supp. 1995) (effective until Jan. 1, 1996); *id.* § 30.1-08-07(1)(b) (Supp. 1995) (effective Jan. 1, 1996).

145. N.D. CENT. CODE § 30.1-08-07(1)(b) (Supp. 1995) (effective Jan. 1, 1996).

146. *See, e.g.*, Thompson v. Royall, 175 S.E. 748, 750 (Va. 1934) (stating that for proper cancellation, there must be marks or lines across the writing of the instrument).

147. N.D. CENT. CODE § 30.1-08-07(2) (Supp. 1995) (effective Jan. 1, 1996).

148. *Id.* § 30.1-08-07(3).

Like most presumptions, this presumption can be rebutted by clear and convincing evidence.[149] If it is not rebutted, the prior will is revoked and only the subsequent will is operative on the testator's death.[150] This means that even if the subsequent will fails for some reason, the prior will is considered revoked and has no legal significance.[151] However, if this presumption is rebutted, then the prior will is merely superseded. If the testator dies with the subsequent will still intact, this subsequent will controls and will distribute the testator's property; the superseded will is of no effect. But if in the case of a merely superseded prior will, the subsequent will fails for some reason, like being physically revoked, then the superseded prior will is automatically reinstated if possible under the circumstances. The second presumption is that "[t]he testator . . . intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate."[152] Again, this presumption can be rebutted by clear and convincing evidence.[153] If it is not rebutted, "the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will" and "each will is fully operative on the testator's death to the extent they are not inconsistent."[154] If the subsequent will fails or is revoked in its entirety, then the prior will disposes of testator's property.[155] Likewise, if this second presumption is rebutted, then the prior will is revoked and only the subsequent will is operative on the testator's death.[156]

Regarding the revival of revoked wills, the prior law did not distinguish between the partial and complete revocation of a will in a case where a subsequent will revoked a prior will and was then itself revoked by a physical act.[157] The revised law makes such a distinction and proposes two standards to determine whether the prior will is revived. First, in the case of a subsequent will that wholly revoked a previous will and then that subsequent will itself is revoked by a physical act, the presumption is that the previous will remains revoked and is not revived.[158] The presumption can be rebutted if the proponent of the previous will can establish that it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary

149. UNIF. PROB. CODE § 2-507 cmt. (1990) (amended 1993).
150. N.D. CENT. CODE § 30.1-08-07(3).
151. *Id.*
152. N.D. CENT. CODE § 30.1-08-07(4).
153. *Id.*
154. *Id.*
155. *Id.* § 30.1-08-07(3).
156. *Id.*
157. N.D. CENT. CODE § 30.1-08-09 (Supp. 1995) (effective until Jan. 1, 1996).
158. N.D. CENT. CODE § 30.1-08-09(1) (Supp. 1995) (effective Jan. 1, 1996).

declarations at the time of revocation or subsequently, that the testator intended the previous will to be revived to take effect as executed.[159] Second, in the case of a subsequent will that partly revoked a previous will and then that subsequent will itself is revoked by a physical act, the presumption is that a revoked part of the previous will is revived.[160] Again the presumption can be rebutted, if the proponent of the previous will can show that it is evident that the testator did not intend the revoked part to take effect as executed.[161] Testimony of the testator's statements made at the time of the revocation of the subsequent will or later, as well as evidence of the circumstances of the revocation of the subsequent will can be admitted to show testator's intent that the revoked part of the previous will be revived.[162]

The revised law retains the prior law's revival doctrine in the event that a subsequent will (Will #2) that revoked a previous will (Will #1), in whole or part, is itself revoked by another, later, will (Will #3). In this type of situation, the previous will (Will #1) remains revoked in whole or in part, unless it appears from the terms of the later will (Will #3) that the testator intended that the previous will (Will #1) or its revoked part, to take effect and thereby be revived.[163]

Regarding separate testamentary writings, the revised law made some changes in the method by which persons can devise "items of tangible personal property, not otherwise specifically disposed of by the will, other than money," without following the requirements of the statute of wills for attested or holographic wills.[164] In order to be able to dispose of this type of property in a written statement or list, the testator must refer to such a document in the will.[165] The Comment to this U.P.C. provision provides a sample clause:

> I might leave a written statement or list disposing of items of personal property. If I do and if my written statement or list is found and is identified as such by my Personal Representative no later than 30 days after the probate of this will, then my

159. *Id.*
160. *Id.* § 30.1-08-09(2).
161. *Id.*
162. *Id.*
163. N.D. CENT. CODE § 30.1-08-09(3) (Supp. 1995) (effective Jan. 1, 1996). The revised law dropped the confusing language in the prior law that followed the words "other than money." *Id.* § 30.1-08-13. The prior law stated that the written statement or list could dispose of "items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities and property used in trade or business." N.D. CENT. CODE § 30.1-08-13 (Supp. 1995) (effective until Jan. 1, 1996). Evidences of indebtedness, documents of title, securities and property used in trade and business were not tangible personal property. *Id.*
164. N.D. CENT. CODE § 30.1-08-13 (Supp. 1995) (effective Jan. 1, 1996).
165. *Id.*

> written statement or list is to be given effect to the extent authorized by law and is to take precedence over any contrary devise or devises of the same item or items of property in this will.[166]

The sample clause states that the items on the list are to take precedence over any specifically devised property; if this statement with regard to such preference was not stated in the will, then the specifically devised property in the will would take precedence over any devises of the same property made in the subsequent lists. The prior law required that these lists or statements be signed by the testator or be in the handwriting of the testator.[167] The revised law requires that all such lists and statements be signed by the testator to avoid mere planning sheets or drafts from becoming valid.[168] The Comment to the U.P.C. for this provision points out that a list or statement of this nature does not have to itemize individual tangible personal property but could dispose of all such property in a document referring to "all my tangible personal property other than money" or to "all my tangible personal property located in my home."[169]

With regard to testamentary additions to trusts, the revised law clarifies one section and revises other sections giving the decedent more alternatives.[170] This statute basically deals with a devise pouring property over from a will to a trust. The prior law allowed a devise in a will to pour over to a trust "established or to be established by the testator;" the revised law specifically states that the devise can also pour over to a trust established "at the testator's death by the testator's devise to the trustee."[171] Other changes in the revised law include: 1) allowing the trust terms that are to be set forth in a written instrument other than a will to be executed not only before or concurrently with the execution of the testator's will, as stated in the prior law, but also after the execution of the testator's will; 2) allowing the trust to be administered according to terms which include amendments made not only before the testator's death, as stated in the prior law, but also after the testator's death; and 3) allowing the decedent's will to provide that a revocation or termination of the trust before the decedent's death will not cause the devise to lapse, an alternative not available under the prior law.[172]

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166. UNIF. PROB. CODE § 2-513 (1990) (amended 1993).
167. N.D. CENT. CODE § 30.1-08-13 (Supp. 1995) (effective until Jan. 1, 1996).
168. N.D. CENT. CODE § 30.1-08-13 (Supp. 1995) (effective Jan. 1, 1996); UNIF. PROB. CODE § 2-513 (1990) (amended 1993).
169. UNIF. PROB. CODE § 2-513.
170. N.D. CENT. CODE § 30.1-08-11 (Supp. 1995) (effective Jan. 1, 1996).
171. N.D. CENT. CODE § 30.1-08-11 (Supp. 1995) (effective until Jan. 1, 1996).
172. N.D. CENT. CODE § 30.1-08-11 (Supp. 1995) (effective Jan. 1, 1996).

With regard to the execution of a will or the revocation of a will by a physical act, the testator need not sign the document or perform the act but may direct another person to sign for him or her or to revoke the document by an act. The revised law stipulates that if another person signs for the testator or revokes the will by an act, that person must do it in the testator's conscious presence.[173] The prior law did not mention a test but merely stated "in the testator's presence."[174] The revised law adopts the conscious presence test, thereby rejecting the scope of vision test.[175]

A. SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

The two laws protecting the spouse and children who have been unprovided for in a premarital will have been revised—one law deals with a surviving spouse who married the testator after the testator executed the will, and the other law deals with a testator's children who were adopted or born after the testator executed the will.[176] Both revised laws reflect a desire to give more effect to the intention of the decedent with regard to his or her testamentary plan for his or her children than was given under the prior law.

Under prior law, the omitted spouse could receive an intestate share unless: 1) it appeared from the will that the omission was intentional; or 2) the testator provided for the spouse by a transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.[177] Under the revised law, the surviving spouse need no longer be an omitted spouse. As long as the surviving spouse received less in a premarital will than he or she would have received if the testator had died intestate, the surviving spouse is entitled to an additional amount to make up the full intestate share.[178] In other words, if the spouse's intestate share is $100,000 and the spouse was given a $50,000 general devise in a premarital will, the spouse would be entitled to receive only another $50,000. The spouse receives $50,000 under the will, plus an additional $50,000 for a total of $100,000, the intestate share. Under the revised law, the surviving spouse is still entitled to an intestate share but within certain limits. The surviving spouse's intestate share cannot be taken either from that portion of the testator's estate that is devised to a child

173. *Id.* §§ 30.1-08-02(1)(b), -07(1).
174. N.D. CENT. CODE §§ 30.1-08-02, -07(2) (Supp. 1995) (effective until Jan. 1, 1996).
175. N.D. CENT. CODE §§ 30.1-08-02(1)(b), -07(2)(b) (Supp. 1995) (effective Jan. 1, 1996).
176. *Id.* §§ 30.1-06-01, -02.
177. N.D. CENT. CODE § 30.1-06-01 (Supp. 1995) (effective until Jan. 1, 1996).
178. N.D. CENT. CODE § 30.1-06-01(1) (Supp. 1995) (effective Jan. 1, 1996).

of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse, nor from that portion of the testator's estate that is devised to a descendant of such a child or passes under the anti-lapse statute to such child, or to a descendant of such child.[179] The surviving spouse is entitled to have an intestate share satisfied from that portion of decedent's estate that is not devised to these specified children or descendants.[180] Finally, even if the surviving spouse qualifies to take an intestate share, the surviving spouse is barred from taking under the revised law if:

> a. It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;
> b. The will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or
> c. The testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer, or by other evidence.[181]

Thus, whereas the prior law called for all devises in the will to be abated in order to provide for the omitted spouse's intestate share, the revised law satisfies the surviving spouse's intestate share by first applying any devises in the will made to the spouse and then abating other devises other than those made to the specified children and their descendants who may take in their own right or by virtue of the anti-lapse statutes.[182]

Regarding the protection of a testator's children who are born or adopted after the testator has executed a will, the revised law makes substantial changes. Under prior law, an after-born or after-adopted child, if qualified to take, was entitled to his or her intestate share, and other devises in the will were abated to satisfy that share.[183] Under the

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179. *Id.*
180. *Id.*
181. *Id.* § 30.1-06-01(1)(a), (b), (c).
182. N.D. CENT. CODE § 30.1-06-01(2) (Supp. 1995) (effective until Jan. 1, 1996); N.D. CENT. CODE § 30.1-06-01(2) (Supp. 1995) (effective Jan. 1, 1996).
183. N.D. CENT. CODE § 30.1-06-02 (Supp. 1995) (effective until Jan. 1, 1996). Such child did not qualify to take an intestate share if:

> a) [i]t appears from the will that the omission was intentional;
> b) [w]hen the will was executed the testator had one or more children and devised substantially all his [or her] estate to the other parent of the omitted child; or
> c) [t]he testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

revised law, such omitted child is entitled to his or her intestate share only if the testator had no child living when the testator executed the will and only if the will did not devise all or substantially all of the estate to the other parent of the omitted child and the other parent survived the testator and is entitled to take under the will.[184] The revised statute presents a formula for determining the share of an omitted child if the testator had one or more children living when the testator executed the will.[185] First, the omitted after-born or after-adopted child is limited to the amount devised in the will to the testator's then living children.[186] Second, this devised amount is divided equally by the number of all omitted after-born and after-adopted children and all the children who received devises under the will.[187] Each omitted after-born or after-adopted child receives this equal share. Third, this share should be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children in the will.[188] Fourth, to satisfy the omitted child's share, the devises to the testator's children who were living when the will was executed abate ratably in accordance with the character of the testamentary plan.[189]

A testator can take steps to prevent a future after-born and after-adopted child from taking a share under this law. Similar to prior law, the revised law states that an omitted child could not qualify to take a share if it appears from the will that the omission was intentional or a transfer was made in lieu of a testamentary provision as shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.[190]

Both the revised and prior laws provide for a living child who received nothing in his or her parent's will only because the parent believes that child to be dead. Under the prior law, that child receives his or her intestate share; under the revised law that child is entitled to share

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Id.

184. N.D. CENT. CODE § 30.1-06-01(1)(a) (Supp. 1995) (effective Jan. 1, 1996). If the omitted child could take the intestate share, the other devises in the will would be abated to satisfy the share pursuant to the rules for abatement under section 30.1-20-02. *Id.* § 30.1-06-02(4).

185. *Id.* § 30.1-06-02(b).

186. *Id.*

187. *Id.*

188. *Id.*

189. N.D. CENT. CODE § 30.1-06-02(b) (Supp. 1995) (effective Jan. 1, 1996). For example, testator had a son and daughter at the time of the execution of her will and devised the son, $10,000 and the daughter, $5,000. Subsequently, she had another daughter. The second daughter, an omitted after-born child, would take $5,000, an equal share of the amount of $15,000 which was devised to the then-living children. The remaining $10,000 would be divided ratably between the son and the first daughter. Since the son was to have received twice the sum as the first daughter the ratio is 2:1. Thus, the son will get two-thirds of the remaining $10,000 or $6,667 and the first daughter will get one-third of the remaining $10,000 or $3,333. For another formula for computing the pro rata reduction, see UNIF. PROB. CODE § 2-302 (1990) (amended 1993).

190. N.D. CENT. CODE § 30.1-06-02(2).

in the estate as if the child were an omitted after-born or after-adopted child.[191] According to both laws, these shares are satisfied according to the rules for abatement.[192]

VI. RULES OF CONSTRUCTION

The revised law makes minor changes in its chapter on rules of construction dealing with wills but has added a chapter dealing with governing instruments.[193] This added chapter reflects the recognition that individuals today dispose of great amounts of wealth through nonprobate devices both during their lifetimes and at death. The movement today is in the direction of unifying the law of probate and nonprobate devices.[194] For example, the lapse statute which formerly was designed to save certain devises that failed in wills is now being used to save gifts being made to certain persons who are beneficiaries of insurance policies and pensions but who die before the insured or the person entitled to the pension.[195] Also, prior law has stipulated that for a devisee to take under a will he or she must survive the testator by 120 hours.[196] Under the revised law that same requirement, unless the governing instrument states otherwise, is applicable to governing instruments such as trusts.[197] The major areas covered by this revised law applicable to governing instruments include: A revised simultaneous death act, an anti-lapse statute, presumptions governing the exercise of a power of appointment, rules of construction of class gifts, and future interests especially future interests in trusts. Not all nonprobate devices are included under these rules, but only those included in the law's definition of "governing instrument."[198]

Statutes in both sections dealing with rules of construction stipulate that the intention of the creator of the governing instrument controls and only when the creator's intention cannot be ascertained, do these rules of

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191. N.D. CENT. CODE § 30.1-06-02(2) (Supp. 1995) (effective until Jan. 1, 1996); N.D. CENT. CODE § 30.1-06-02(3) (Supp. 1995) (effective Jan. 1, 1996).

192. N.D. CENT. CODE § 30.1-06-02(3) (Supp. 1995) (effective until Jan. 1, 1996); N.D. CENT. CODE § 30.1-06-02(4) (Supp. 1995) (effective Jan. 1, 1996).

193. N.D. CENT. CODE §§ 30.1-09-01 to -13, 30.1-09.1-01 to -11 (Supp. 1995) (effective Jan. 1, 1996).

194. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984).

195. N.D. CENT. CODE § 30.1-09.1-06.

196. N.D. CENT. CODE § 30.1-09-01 (Supp. 1995) (repealed effective Jan. 1, 1996).

197. N.D. CENT. CODE § 30.1-09.1-02 (Supp. 1995) (effective Jan. 1, 1996).

198. The devices included in the term "governing instrument" are "a deed, will, trust, insurance or annuity policy, account with payable on death designation, security registered in beneficiary form transferable on death, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type." *Id.* § 30.1-01-06(20).

construction apply.[199] In a sense these rules are presumptions that can be rebutted. They can be helpful both in interpreting wills and other governing instruments and in drafting such instruments.

A. THE REVISED SIMULTANEOUS DEATH STATUTE

The North Dakota Uniform Simultaneous Death Act has been repealed and replaced with a section in the chapter on rules of construction for governing instruments.[200] The Uniform Simultaneous Death Act only addressed situations in which it was impossible to determine who died first.[201] For all practical purposes this new section is the new simultaneous death act except that it goes further than the former Act. The revised law imposes the 120 hour requirement of survival on persons involved in situations which otherwise would be covered by the former Act as well as in situations which would not be covered by the former Act because it could be determined who died first.[202] Even though one person survives another, the revised law requires them also to survive the decedent by 120 hours.[203]

A separate statute in another chapter of the probate code deals with heirs who fail to survive their intestate deceased by the 120 hours. The statute states any individual who failes to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead, exempt property, and intestate succession.[204] Further, if it is not established by clear and convincing evidence that an individual, who would otherwise take under the intestate succession laws, survived the decedent by 120 hours, that individual is deemed to have failed to survive for the required period.[205] This statute is not to be applied if its application would result in an escheat to the state.[206]

The revised law, which can be viewed as an improved simultaneous death act, applies to governing instruments and to all situations which arise under the probate code. This law states that an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by 120 hours is deemed

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199. N.D. CENT. CODE §§ 30.1-09.1-03, -01 (Supp. 1995) (effective Jan. 1, 1996).

200. N.D. CENT. CODE § 31-12-01 to -06 (Supp. 1995) (repealed effective Jan. 1, 1996); N.D. CENT. CODE § 30.1-09.1-02 (Supp. 1995) (effective Jan. 1, 1996).

201. N.D. CENT. CODE § 31-12-01 (Supp. 1995) (repealed effective Jan. 1, 1996).

202. N.D. CENT. CODE § 30.1-09.1-02(1), (2) (Supp. 1995) (effective Jan. 1, 1996).

203. *Id.*

204. *Id.* § 30.1-04-04.

205. *Id.*

206. *Id.* This slightly revised statute is not included under the sections for rules of construction, because no contrary intention, written or declared by a person who died intestate, can reverse its operation: An heir who did not survive the decedent by the 120 hours is deemed to have predeceased the decedent. *Id.*

to have predeceased the event.[207] One example, would be a devisee who does not survive the testator by 120 hours. Another example would be the case of a co-owner of property with a right of survivorship who fails to survive the death of another co-owner. The revised law states that if it is not established by clear and convincing evidence that one of two co-owners survived the other co-owner by 120 hours, one-half of the property passes as if one had survived by 120 hours, and one-half as if the other had survived by 120 hours.[208] If there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by 120 hours, the property passes in the proportion that one bears to the whole number of co-owners.[209]

There are four circumstances under which survival by 120 hours is not required. First, the governing language may address the problem, for example, by saying in a will that a devisee must survive the decedent by 30 days in order to take the devise. More particularly, not only must there be language in the instrument that deals explicitly with simultaneous deaths or deaths in a common disaster, but that language must also be operable under the facts of the case.[210] Second, a person may in a governing instrument expressly state either that an individual is not required to survive an event, including the death of another individual by any specified period or that an individual is required to survive the event by a specified period.[211] For example, it is possible to have a person take under the governing instrument as long as that person survives the creator of the instrument even if that person only survives the creator by one minute. However, survival of the stated event or the stated specified period must be established by clear and convincing evidence.[212] Third, survival by the 120 hours is not required if the imposition of the requirement would cause a nonvested property interest or a power of appointment to fail as a violation of the rule against perpetuities.[213] Survival of the creator of the governing interest must nonetheless be proved by clear and convincing evidence. Fourth, when the application of the 120-hour requirement to multiple governing instruments would result in an unintended failure or duplication of a disposition, then survival by the

207. N.D. CENT. CODE § 30.1-09.1-02 (1), (2). (Supp. 1995) (effective Jan. 1, 1996).

208. *Id.* § 30.1-09.1-02(3).

209. *Id.* "[T]he term 'co-owners with right of survivorship' [in this context] includes joint tenants, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitles one or more to the whole of the property or account on the death of the other or others." *Id.*

210. *Id.* § 30.1-09-02(4)(a).

211. *Id.* § 30.1-09.1-02(4)(b).

212. N.D. CENT. CODE § 30.1-09.1-02(4)(b) (Supp. 1995) (effective Jan. 1, 1996).

213. *Id.* § 30.1-09.1-02(4)(c).

120 hours is not required.[214] For example, if survival by 120 hours is required in a case in which a husband and wife each in their respective wills left $50,000 to Charity A and then subsequently died in a common disaster with the wife surviving the husband by only 48 hours, their respective estates would be administrated as if each had predeceased the other with Charity A receiving two separate $50,000 gifts. The fourth exception to the imposition of the 120-hour requirement is designed to prevent this duplication of gifts and thus only the $50,000 charitable devise in the wife's will is effective.[215]

B. THE LAPSE STATUTES

There are two anti-lapse statutes, one dealing with wills and the other dealing with governing instruments. The U.P.C. proposed a comprehensive solution to lapse problems and applied it not only to wills as was done in the pre-1990 U.P.C., but also in a new section to governing instruments.[216] This new section addresses a number of problems that have arisen in recent years and were not addressed or answerable under the pre-1990 U.P.C. anti-lapse statutes. The North Dakota Legislature retained the anti-lapse statutes based on the pre-1990 Code, but adopted the U.P.C.'s new anti-lapse statute for governing instruments.[217] The legislature also adopted a new statute dealing with future interests under the terms of a trust.[218]

The anti-lapse statute for wills saves a devise for descendants of a deceased devisee who fails to survive the testator provided that the deceased devisee is a grandparent or lineal descendant of a grandparent of the testator.[219] These descendants have to survive the testator by 120 hours.[220] This statute also applies to class gifts.[221] If an anti-lapse statute

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214. *Id.* § 30.1-09.1-(4)(d).
215. UNIF. PROB. CODE § 2-702 (1990) (amended 1993).
216. *Id.* §§ 2-603, -604, -705.
217. N.D. CENT. CODE §§ 30.1-09-05, -06, 30.1-09.1-06 (Supp. 1995) (effective Jan. 1, 1996).
218. *Id.* § 30.1-09.1-07.
219. *Id.* § 30.1-09-05. This law states:

> If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if the devisee predeceased the testator, the issue of the deceased devisee who survive the testator by one hundred twenty hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree, then those of more remote degree take by representation. One who would have been a devisee under a class gift if that person had survived the testator is treated as a devisee for purposes of this section where that person's death occurred before or after the execution of the will.

Id.
220. *Id.*
221. *Id.*

fails to save the devise, it fails and becomes part of the residuary.[222] If the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee or devisees in proportion to the interests of each in the remaining part of the residue.[223]

Although the new anti-lapse statute applicable to governing instruments presents a different conceptual framework, it nonetheless provides the same basic protection for descendants of a deceased beneficiary who fails to survive the decedent.[224] One difference is that the deceased beneficiary may also be a stepchild as well as a grandparent or lineal descendant of a grandparent of the testator.[225] Another difference is that the new law applies the anti-lapse protection only to class gifts that are single generational, such as children, grandchildren, brothers, sisters, and the like, and not to multigenerational class gifts, such as issue, descendants, heirs, relatives, family, and language of similar import.[226]

An example of how this new anti-lapse statute would apply to an insurance policy is as follows: If a beneficiary of an insurance policy dies before the insured, the proceeds of the policy, which does not name an alternative beneficiary, will ordinarily go to the insured's estate. The new anti-lapse statute will save the gift to that beneficiary for the beneficiary's surviving descendants if the beneficiary is a grandparent, a descendant of a grandparent, or a stepchild of the deceased beneficiary.[227] The surviving descendants of this substitute gift take by representation the proceeds of the policy to which the beneficiary would have been entitled had the beneficiary survived the decedent.[228] This same law applies if the proceeds of the insurance policy were payable to a group of beneficiaries in the form of a class gift, other than a beneficiary designation to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," "family," or a class described by language of similar import.[229] The proceeds to which the beneficiaries would have

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222. N.D. CENT. CODE § 30.1-09-06(1) (Supp. 1995) (effective Jan. 1, 1996).
223. *Id.* § 30.1-09-06(2).
224. *Id.* § 30.1-09.1-06(2). This statute states:

> If the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. . . . [I]f the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue", "descendants", "heirs of the body" . . . or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary.

Id. § 30.1-09.1-06(2)(a), (b).
225. *Id.*
226. *Id.* § 30.1-09.1-06(2)(b).
227. N.D. CENT. CODE § 30.1-09.1-06(2)(a) (Supp. 1995) (effective Jan. 1, 1996).
228. *Id.*
229. *Id.* § 30.1-09-06(2)(b).

been entitled, had all of them survived the decedent passes to the surviving beneficiaries and the surviving descendants of deceased beneficiaries. The latter group takes the substitute gift by representation.[230]

The system of representation to be used under this statute is the same as that applied in the intestate succession law.[231] Although the law is set forth as applied in the case of an insurance policy, this law is applicable to all governing instruments in which a beneficiary fails to survive a decedent. This law is an example of the trend to unify the law of probate and nonprobate devices. In this instance, the law applies to certain nonprobate instruments, an anti-lapse protection which was traditionally confined to the law of wills.

Another area of concern that the new anti-lapse statute addresses is what precise language should be used to prevent the application of an anti-lapse provision. Some recent decisions suggest that certain words of survivorship do not automatically mean that the anti-lapse statute will not apply.[232] In a Minnesota case, *In re Estate of Ulrikson*,[233] a testator left her residuary estate to her brother and sister to, "share and share alike, and in the event that either one of them shall predecease me, then to the other surviving brother and sister."[234] Both the brother and sister predeceased the testator with only the brother leaving descendants who survived the testator.[235] The court construed the words of survivorship to be effective only if there were survivors, that is, if the brother survived the sister, or vice-versa.[236] The court observed that: "Since there were no survivors in this case, the anti-lapse statute is free to operate."[237] The court applied the anti-lapse statute and allowed the residuary estate to pass to the brother's descendants.[238]

The traditional approach to defeat the anti-lapse statute has been to use words of survivorship. For example, a devise "to my brother, if he survives me" or "to my surviving nephews" was interpreted to mean that only those who in fact survive take the gift and if they do not survive, their gifts lapse and pass by residuary clauses, if any, but surely do not go to their surviving descendants. The new anti-lapse statute states that such words of survivorship in governing instruments are not,

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230. *Id.*

231. The term "beneficiary" excludes a joint tenant of a joint tenancy with the right of survivorship and a party to a joint and survivorship account. *Id.* § 30.1-09-06(1)(b). *See id.* § 30.1-01-06.

232. 8 U.L.A. 2603 (1983) (Supp. 1995) (containing the 1990 U.P.C. with 1993 amendments).

233. 290 N.W.2d. 757 (Minn. 1980).

234. In re Estate of Ulrikson, 290 N.W. 2d 757, 758-59 (Minn. 1980).

235. *Id.* at 758.

236. *Id.* at 759.

237. *Id.*

238. *Id.* at 760.

in the absence of additional evidence, a sufficient indication of intent that the anti-lapse statutes should not be applicable.[239] To defeat the anti-lapse statute's application, an insurance policy designating a beneficiary should probably state something such as "to my beneficiary, A, but not to A's descendants."

The anti-lapse law with regard to wills does not address this concern. Nonetheless, it may be helpful to use some of the "foolproof" means of expressing an intention that the anti-lapse statute should not apply as set forth by the U.P.C. in its comment dealing with wills.[240] These "foolproof" means include: 1) adding to a devise the phrase "and not to [the devisee's] descendants;" 2) adding in a power of appointment instrument the phrase "and not to an appointee's descendants;" 3) adding to the residuary clause the phrase "including all lapsed or failed devises;" 4) adding to a nonresiduary devise the phrase "if the devisee does not survive me, the devise is to pass under the residuary clause;" and 5) adding to a will a separate clause stating "if the devisee of any nonresiduary devise does not survive me, the devise is to pass under the residuary clause."[241]

The new anti-lapse statute dealing with governing instruments uses some technical terminology in a number of different scenarios.[242] Scenario #1: An insurance policy of an insured who has died is payable "to A if she survives me; if not to B." A and B are nieces of the insured. A, the beneficiary of a beneficiary designation, predeceases the insured and leaves descendants who survived the insured. The new law refers to B as the beneficiary of an alternative beneficiary designation and provides that B rather than the descendants of A is entitled to take the proceeds of the policy. The alternative beneficiary supersedes the substitute gift to A's descendants who would have taken under the anti-lapse statute had there been no expressly designated beneficiary of the alternative beneficiary designation who is entitled to take.[243]

Scenario #2: An identical insurance policy as in Scenario #1 is payable "to A if she survives me; if not to B," except that both nieces, A and B, predeceased the insured and both left descendants surviving the insured. Since A is the beneficiary of the beneficiary designation, those descendants of A who would take a substitute gift from A under these

239. N.D. CENT. CODE § 30.1-09.1-06(2)(c) (Supp. 1995) (effective Jan. 1, 1996).

240. UNIF. PROB. CODE § 2-603 (1990) (amended 1993).

241. *Id.* These "foolproof" methods can be found in various examples in the comment to this section of the U.P.C. *Id.*

242. N.D. CENT. CODE § 30.1-09.1-06 (Supp. 1995) (effective Jan 1, 1996). For a more detailed examination of the new terminology, see the new language contained in § 30.1-09.1-06(1), (2), (3).

243. *Id.* § 30.1-09.1-06(2)(d).

anti-lapse rules are said to take the primary substitute gift.[244] In deciding whether A's descendants or B's descendants take under this scenario, the revised law simply states that the property passes under the primary substitute gift; therefore A's descendants take the proceeds of the policy and not B's descendants.[245] An exception to this latter rule is made under facts in the next scenario.

Scenario #3: An insurance policy of an insured who has died is payable: "To my son A if he is living at my death, if not, to A's children, X and Y." A and X predeceased the insured; A's child Y and X's children, M and N, survived the insured. Under the new law, the gift to A's children is termed a younger-generation substitute gift which means the substitute gift is created with respect to a younger-generation beneficiary designation.[246] X and Y are beneficiaries of a younger-generation beneficiary designation because that type of designation: 1) is to a descendant of the primary beneficiary designation; 2) is an alternative beneficiary designation with respect to a primary beneficiary designation; 3) is a beneficiary designation for which a substitute gift is created; and 4) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the decedent except the deceased beneficiary or beneficiaries of the primary beneficiary designation.[247] A's children qualify as beneficiaries under this definition. They are descendants of A, the beneficiary of a primary beneficiary designation. Since A, if living would be entitled to take, the children are beneficiaries of the alternative beneficiary designation. Since A is deceased, the class of children is entitled to take and if one of those children would have taken if he or she had not predeceased A, such as happened in the case of X, then the anti-lapse statute gives the surviving descendants of X a substitute gift. Finally, the class of children, had they all survived, would have taken if A and those who would take substitute gifts from A under the anti-lapse provisions were deceased. Thus, rather than follow the rule in Scenario #2 and give some of the proceeds under the primary substitute gift, the law passes the proceeds under the younger-generation gift with one-half of the proceeds to Y and the other half of the proceeds to M and N.[248] Had the law not provided for the case of a younger generation gift, the rule in Scenario #2 would apply and would have given Y one-half of the proceeds plus one-half of the proceeds to A; M and N would take only one-half of one-half of the proceeds.

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244. *Id.* § 30.1-09.1-06(3)(a).
245. *Id.*
246. *Id.* § 30.1-09.1-06(3)(c)(4).
247. N.D. CENT. CODE § 30.1-09.1-06(3)(c)(3) (Supp. 1995) (effective Jan. 1, 1996).
248. *Id.* § 30.1-09.1-06(3)(b).

In addition to applying a comprehensive anti-lapse statute to governing instruments, the revised law in another statute projects the anti-lapse concept into the area of future interests in trusts.[249] The need to apply an anti-lapse concept arises because the revised law reverses the common law which did not imply conditions of survivorship in the case of future interests in trust.[250] The revised law specifically states, "a future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date."[251] Thus, if a trust is set up to give the income to A for life, and the remainder to B, B must survive A in order to qualify to take the property. At common law, B had a vested remainder rather than a contingent remainder and if B predeceased A, B's remainder interest would go to B's estate. Under the revised law, if B does not survive A, the interest to B fails and thus does not go to B's estate. To compensate in part for B losing what would otherwise at common law be a vested interest, the revised law applies the anti-lapse concept and saves B's interest for B's surviving descendants.[252] If B has no surviving descendants and the interest was created in a devise in the transferor's will, other than in the residuary clause, then the interest passes under the residuary clause.[253] In this context, the residuary clause is treated as creating a future interest. If the property is not disposed of by the will, the property will pass to the transferor's heirs under the intestate succession law.[254] If B has no surviving descendants and the future interest is created by an exercise of a power of appointment, the property passes by the clause that names the donor's taker-in-default.[255] In this context, such a clause is treated as creating a future interest under the terms of a trust.[256] If this property does not pass to a taker-in-default, the property passes to the transferor's devisees and/or heirs.[257]

The rationale for turning what was formerly considered a vested remainder in a trust into a contingent remainder is the need to avoid the estate problems involved when a remainder beneficiary dies years before the income beneficiary. At the income beneficiary's death, the estate of the deceased remainder beneficiary has to be re-opened; in distributing

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249. *Id.* § 30.1-09.1-07.
250. UNIF. PROB. CODE § 2-707 (1990) (amended 1993).
251. N.D. CENT. CODE § 30.1-09.1-07(2) (Supp. 1995) (effective Jan. 1, 1996).
252. *Id.*
253. *Id.* § 30.1-09.1-07(4)(a).
254. *Id.* § 30.1-09.1-07(4)(b).
255. *Id.* § 30.1-09.1-07(5)(a).
256. N.D. CENT. CODE § 30.1-09.1-07(5)(a) (Supp. 1995) (effective Jan. 1, 1996).
257. *Id.* § 30.1-09.1-07(5)(b). The property passes as described in § 30.1-09.1-07(4). *Id.* In this context, "transferor" means the donor if the power was a nongeneral or special power and means the donee if the power was a general power. *Id.*

property through this re-opened estate, other estates of deceased heirs or devisees might have to be re-opened. Such procedures could be costly and cumbersome.[258] However, this law reversing the common law is applicable only to future interests in trusts. The common law still controls future interests in other legal devices.[259] A deed transferring farm land "to A for life, remainder to B" would in many jurisdictions give B a vested remainder. A and B during their lifetimes could validly sell their land and convey good title. They would not be able to do that if their interests were created in a trust because the revised law creates a contingent substitute gift in their descendants.[260] A person could however set up a trust and create a vested remainder interest by phrases such as "income to A for life, remainder to B or B's estate" or "income to A for life, remainder to B whether or not B survives A."[261] As in the case of the anti-lapse statute dealing with governing instruments, the revised law warns against using ambiguous survivorship language to defeat the anti-lapse provision of this statute, at least in the absence of additional evidence.[262]

The anti-lapse provision of the revised law provides that if the remainder beneficiary fails to survive the distribution date, a substitute gift is created in the beneficiary's surviving descendants.[263] If the future interest is in the form of a class gift, a substitute gift is created in the surviving descendants of any deceased beneficiary.[264] It is not necessary that these deceased beneficiaries be related in some way to the settlor of the trust as is required of a deceased beneficiary under the applicable anti-lapse statute for governing instruments, who has to be a grandparent, a descendant of a grandparent, or a stepchild of the creator of a governing instrument in order to take the substitute gift. This law also uses similar anti-lapse terminology and provides similar rules for solving various problems as set forth in the three scenarios discussed with respect to the anti-lapse statute applicable to governing instruments.[265]

C. DEFINITIONS AND CONSTRUCTION OF CLASS GIFTS

The revised law alters one section dealing with the interpretation of class gifts that are made in wills and adds a number of revised definitions and rules of construction for class gifts. The law on this topic appears in

258. UNIF. PROB. CODE § 2-707 (1990) (amended 1993).
259. N.D. CENT. CODE § 30.1-09.1-07(2) (Supp. 1995) (effective Jan. 1, 1996).
260. *Id.*
261. UNIF. PROB. CODE § 2-207 (1990) (amended 1993).
262. *Id.* § 30.1-09.1-07(2)(c).
263. *Id.* § 30.1-09.1-07(2)(a).
264. N.D. CENT. CODE § 30.1-09.1-07(2)(b) (Supp. 1995) (effective Jan. 1, 1996).
265. *Id.* § 30.1-09.1-07(2)(d)(3). *See supra* notes 228-34 and accompanying text.

the chapter regulating governing instruments which, among other documents, includes wills.[266] These definitions and rules are helpful not only in interpreting class gift terms that appear in documents but also in drafting documents in which these terms are used. These rules control the construction of governing instruments unless stated otherwise in those documents or from other evidence.[267]

Under both prior law and the revised law, halfbloods, adopted persons, and persons born out of wedlock or nonmarital persons are included in class gift terminology if they would take under the intestate succession law, had the decedent died intestate.[268] The revised law specifically states adopted persons and nonmarital persons are included as well as their respective descendants if appropriate to the class.[269] However, under the revised law, adopted and nonmarital children will not be presumed included in class gift terminology in all scenarios. If a transferor who is not the natural parent, makes a transfer to an individual born to a natural parent, that individual is not considered the child of the parent unless the individual lived while a minor as a regular member of the household of that natural parent or that parent's parent, brother, sister, spouse, or surviving spouse.[270] Likewise, if a transferor who is not the adopting parent makes a transfer to an adopted individual, that individual is not considered the child of the adopting parent unless the adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent.[271]

The revised law distinguishes relationships by blood from those by affinity. If a person creates a trust to pay the income "to my nephews" and does not distinguish between nephews related by blood or nephews related by marriage, such as one's spouse's nephews, the presumption is raised that only those nephews related by blood are included in the class gift.[272]

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266. N.D. CENT. CODE § 30.1-09.1-01 (Supp. 1995) (effective Jan. 1, 1996).

267. *Id.*

268. N.D. CENT. CODE § 30.1-09-11, *repealed by* Uniform Probate Code Changes, ch. 334, sec. 50, 1993 N.D. Laws 1143 (effective Jan. 1, 1996); N.D. CENT. CODE § 30.1-09.1-05(1) (Supp. 1995) (effective Jan. 1, 1996).

269. N.D. CENT. CODE § 30.1-09.1-05(1) (Supp. 1995) (effective Jan. 1, 1996).

270. *Id.* § 30.1-09.1-05(2). For example, if a grandfather gave property in his will "to my granddaughter, it will be presumed that this class gift does not include an adopted granddaughter unless the granddaughter lived, while a minor, as a regular member of the household of certain relatives." To include the granddaughter in the will, the grandfather would have to name the grandchild specifically. The revised law is based on the premise that grandparents and other transferors would not intend adopted and nonmarital children to be included in the class gift if they did not live with certain family members while they were minors.

271. *Id.* § 30.1-09.1-05(3).

272. *Id.* § 30.1-09.1-05(1).

The revised law addresses the problem of interpreting class gifts made to "descendants," "issue," or "heirs of the body" when the document does not specify the manner in which the property is to be distributed. In these types of multiple generation class gifts, the law raises the presumption that property is to be "distributed among the class members who are living when the interest is to take effect in possession or enjoyment, in such shares as they would receive, under the applicable law of intestate succession, if the designated ancestor had then died intestate owning the subject matter of the class gift."[273] This law rejects the presumption that a strict per stirpes distribution system is to be applied regardless of the applicable intestate succession law.[274]

The revised law also addresses the problem of construing terms such as "heirs," "heirs at law," "next of kin," "relatives," "family" or language of similar import that appear in certain statutes and governing instruments.[275] If these terms are used, the presumption is that the property passes to those persons, and in such shares as would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile, if the designated individual died when the disposition was to take effect in possession or enjoyment.[276] There is one exception to this presumption. If the designated individual's surviving spouse is living, but remarried at the time the interest is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.[277]

One area of construction that has presented problems for courts is the use of the terms "by representation" or "per stirpes" following a gift to a class of individuals, such as "to my brothers, per stirpes." If a will uses these two particular terms, "by representation" or "per stirpes," the revised law raises the presumption that a system of strict per stirpes is to be applied.[278] Under strict per stirpes, the initial division of the estate is made at the first generation even if no individual survives the ancestor.[279] For example, if a mother dies intestate, survived only by six

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273. *Id.* § 30.1-09.1-08.

274. UNIF. PROB. CODE § 2-708 (1990) (amended 1993).

275. N.D. CENT. CODE § 30.1-09.1-11 (Supp. 1995) (effective Jan. 1, 1996).

276. *Id.* This presumption is applicable to both present and future interests that are created in favor of "heirs," "relatives," "family," etc. *Id.*

277. *Id.*

278. *Id.* § 30.1-09.1-09(2).

279. UNIF. PROB. CODE § 2-709(c) (1990) (amended 1993). The statute describes the strict per stirpes formula as follows: If an applicable statute or a governing instrument calls for property to be distributed "by representation" or "per stirpes," the property is divided into as many equal share as there are surviving children of the designated ancestor and deceased children who left surviving descendants. *Id.* Each surviving child is allocated one share. *Id.* "The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants." *Id.* The

grandchildren, the division of her estate will be made first at her children's generation, by dividing the estate into as many portions as there are deceased children who have descendants surviving their grandmother. Unless each deceased child had the same number of children, each grandchild will not receive an equal share. If a will states that individuals are to take property "per capita at each generation," the presumption is that the system of representation defined in the U.P.C. is to be applied.[280] This system ensures that all individuals in each generation will take equal shares. For example, if a grandfather dies intestate with one child living and two deceased children, one of whom has two children surviving their grandfather and the other deceased child has one child surviving her grandfather, all three grandchildren will share equally in two-thirds of their grandfather's estate. In other words, the shares that the grandchildren's parents would have received had they been living will be combined and shared equally with the grandchildren.[281] In order for a will to give property to individuals to take by representation under North Dakota definition's of representation, reference must be made specifically to section 30.1-04-06 of the North Dakota Century Code or the pre-1990 U.P.C.'s definition in section 2-106.[282]

Under the revised law, the doctrine of worthier title is abolished as a rule of law and as a rule of construction.[283] Thus, a clause such as "to the transferor's heirs or heirs at law," will not create a reversionary interest in the transferor.[284]

1993 amendment to the U.P.C. which was not adopted in North Dakota, revised the second sentence of this statute to read "Each surviving child, if any, is allocated one share." *Id.* The Comment in the Code states that this revision was made to clarify the point that, under per stirpes, the initial division of the estate is made at the children generation even if no child survives the ancestor. *Id.*

280. N.D. CENT. CODE § 30.1-09.1-09(2) (Supp. 1995) (effective Jan. 1, 1996).

281. *Id.* The statute describes the "per capital at each generation" system of representation as follows:

> If a governing instrument calls for property to be distributed "per capita at each generation," the property is divided into as many equal shares as there are surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.

Id.

282. *See supra* note 7 and accompanying text (discussing the revised law).

283. N.D. CENT. CODE § 30.1-09.1-10 (Supp. 1995) (effective Jan. 1, 1996).

284. *Id.*

D. EXERCISE OF POWER OF APPOINTMENT

The rules for exercising a power of appointment in a will remain the same under both the prior and revised law. Neither a general residuary clause in a will nor a will making a general disposition of all of testator's property will exercise a power of appointment held by the testator unless specific reference is made to the power or there is some indication of intention to include the property subject to the power.[285] The legislature rejected the U.P.C.'s suggestion that in the absence of a requirement that the power be exercised by a reference, or an express or specific reference, a general disposition or general residuary clause could also validly exercise a power if the power is a general power and the creating instrument does not name a taker-in-default.[286]

A revised provision for the exercise of a power of appointment was added in the chapter on rules of construction dealing with governing instruments. The revised law addresses the exercise of the power in a case in which the governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source. In such a case, the law raises the presumption that the donor's intention, in requiring that the donee exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power.[287] Thus, a blanket-exercise clause, such as "any property over which I have a power of appointment," would not be effective to exercise the power because there would be no sufficient reference to the particular power.[288] Since all presumptions raised by this chapter are subject to being rebutted, a blending clause could suffice to exercise the power if a contrary intent is shown on the part of the donor and/or the donee.[289]

VII. GENERAL PROVISIONS FOR PROBATE AND NONPROBATE TRANSFERS

One aim of the U.P.C. is to unify the law regarding both wills and other governing instruments. In two areas of law addressed in this section, the U.P.C. applies to nonprobate transfers rules that have been traditionally applicable only to wills and intestate succession. These

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285. *Id.* § 30.1-09-10.

286. *See generally* UNIF. PROB. CODE § 2-608 (1990) (amended 1993) (discussing the power of appointment).

287. N.D. CENT. CODE § 30.1-09.1-04 (Supp. 1995) (effective Jan. 1, 1996).

288. *See* UNIF. PROB. CODE § 2-704 (1990) (amended 1993) (discussing the power of appointment and meaning of the specific reference requirement).

289. N.D. CENT. CODE § 30.1-09.1-01 (Supp. 1995) (effective Jan. 1, 1996).

areas are concerned with the effect of homicide committed by beneficiaries named in certain governing instruments, and the revocation of nonprobate transfers by divorce.[290] The law on disclaiming interests in property has been long available for beneficiaries of both probate and nonprobate transfers but is now treated in one section in the U.P.C. Finally, a section defining the term "surviving spouse" is set forth and clarified at least for purposes of intestate succession, elective share, a pre-marital will, exempt property, and family allowance.

A. THE RIGHT TO DISCLAIM

The North Dakota Legislature repealed its "Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act" and combined it with prior probate law on renunciation of succession.[291] The revised law addresses the right to disclaim interests in all property whether the property or interest has devolved to the disclaimant under a testamentary interest or intestate succession or under a nontestamentary instrument or contract.[292] The revised law gives the right to disclaim in broad terms to any person or the representative of any person to whom an interest in property devolves by whatever means.[293] Basically, the same time limits for filing are maintained—if a present interest, not later than nine months after death of the deceased owner or deceased donee or under a nontestamentary instrument or contract, not later than nine months after the effective date of the nontestamentary instrument or contract, or if a future interest, not later than nine months after the event determining that the taker of the property or interest is finally ascertained and the interest is indefeasibly vested.[294]

To be effective, the disclaimer must be filed in the court of the county in which proceedings for the administration of the estate of the deceased owner or deceased donee of the power have been commenced.[295] A copy of the disclaimer must be delivered in person or

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290. Other areas discussed previously that have applied traditional law for wills to nonprobate transfers include the anti-lapse statue and the requirement of surviving the decedent by 120 hours in order to take under a governing instrument. *See supra* notes 208-265 and accompanying text.

291. N.D. CENT. CODE § 47-11.1-01 (Supp. 1995) (repealing the Act); N.D. CENT. CODE § 30.1-10-01 (Supp. 1995) (effective until Jan. 1, 1996) (discussing renunciation of succession); N.D. CENT. CODE § 30.1-10-01 (Supp. 1995) (effective Jan. 1, 1996) (discussing disclaimer of property interests).

292. N.D. CENT. CODE § 30.1-10-01 (Supp. 1995) (effective Jan. 1, 1996).

293. *Id.* § 30.1-10-01(1).

294. *Id.* § 30.1-10-01(2)(a), (b). The prior law ran the nine-month period after the person entitled to disclaim had "actual knowledge" of the existence of the interest whereas the new revised law runs the time period from the time that the person "learns" of the interest. N.D. CENT. CODE § 47-11.1-02(1) (Supp. 1995) (effective until Jan. 1, 1996); N.D. CENT. CODE § 30.1-10-01(2)(b) (Supp. 1995) (effective until Jan. 1, 1996).

295. N.D. CENT. CODE § 30.1-10-01(2)(a), (b) (Supp. 1995) (effective Jan. 1, 1996).

mailed by registered mail to any personal representative or other fiduciary of the decedent or donee of the power.[296] In the case of a nontestamentary instrument or contract, the disclaimer must be delivered in person or mailed by registered mail to the person who has legal title to or possession of the interest disclaimed.[297] The general rule under both the revised and prior law is that property or interest disclaimed devolves as if the disclaimant had predeceased the decedent or had predeceased the effective date of the instrument or contract.[298] However, the revised law clarifies the effect of a disclaimer in the event that by law or under the will, the nontestamentary instrument or a contract, the descendants of the disclaimant would share in the disclaimed interest by representation or otherwise were the disclaimant considered to have predeceased the decedent or to have predeceased the effective date of the nontestamentary instrument or contract. In such event, the disclaimed interests pass by representation, or pass as directed by the governing instrument, to the descendants of the disclaimant who survive the decedent or the effective date of the instrument.[299] The purpose of the clarification is to ensure that a person cannot disclaim in order to have his or her descendants receive a share greater than the disclaimant would have received had the disclaimant not exercised his or her right to disclaim.[300]

B. EFFECT OF HOMICIDE ON PROBATE AND CERTAIN NONPROBATE TRANSFERS

The revised law dealing with the slayer/decedent relationship is more explicit on which wrongful acquisitions of property or interest by a killer are to be forfeited. Both the prior and revised laws have a catch-all section that any wrongful acquisition of property by a killer not covered by the statute is to be treated in accordance with the principle that a killer cannot profit from any wrong.[301] The revised law continues to apply to the same transfers that were covered by the prior law—intestate succes-

296. *Id.*

297. *Id.* If real property or an interest in real property is disclaimed, a copy of the disclaimer may be recorded in the office of the register of the deeds in the county in which the property or interest disclaimed is located. *Id.* § 30.1-10-01(3).

298. N.D. CENT. CODE § 47-11.1-03 (Supp. 1995) (repealed effective Jan. 1, 1996); N.D. CENT. CODE § 30.1-10-01(3) (Supp. 1995) (effective until Jan. 1, 1996); N.D. CENT. CODE § 30.1-10-01(2)(a), (b) (Supp. 1995) (effective Jan. 1, 1996).

299. N.D. CENT. CODE § 30.1-10-01(4)(a), (b) (Supp. 1995) (effective Jan. 1, 1996).

300. *See* Uniform Probate Code Practice Manual (referring to various ways that the language in the prior law could be interpreted).

301. N.D. CENT. CODE § 30.1-10-03(4) (Supp. 1995) (effective until Jan. 1, 1996); N.D. CENT CODE § 30.1-10-03(6) (Supp. 1995) (effective Jan. 1, 1996). The new law explicitly spells out the principle of this statute, namely, that a killer cannot profit from any wrong. *Id.*

sion, wills, joint tenancies in real and personal property, joint accounts in banks, savings and loan associations, credit unions and other institutions, as well as bonds, life insurance policies and other contractual relationships.[302] However, the revised law rather than stating specific transfers, covers the wrongful acquisitions by a killer in broader terms. First, the individual who intentionally and feloniously kills the decedent "forfeits all benefits under this title with respect to the decedent's estate."[303] Second, the intentional and felonious killing of the decedent revokes: a) any revocable disposition or appointment of property made by the decedent to the killer in a governing instrument; b) any provision in a governing instrument conferring a general or nongeneral power of appointment on the killer; and c) any nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity.[304] Third, the intentional and felonious killing severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship.[305] Once the wrongful acquisitions by the killer are identified, the traditional principle of the law applies and the killer is to be deprived of these benefits. The prior law simply stated that probate benefits pass as if the killer had predeceased the decedent and contractual benefits become payable as though the killer had predeceased the decedent.[306] The revised law uses a different approach stating that decedent's intestate estate passes as if the killer disclaimed the killer's intestate share and provisions of a governing instrument are to be given

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302. N.D. CENT. CODE § 30.1-10-03 (Supp. 1995) (effective Jan. 1, 1996).

303. *Id.* § 30.1-10-03(2). Included in these benefits under the decedent's estate are an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. *Id.*

304. *Id.* § 30.1-10-03(3)(a). The statute defines "revocable" to mean a disposition, appointment, provision or nomination:

> Under which the decedent, at the time of or immediately before death, was alone empowered, by law or under the governing instrument, to cancel the designation, in favor of the killer, whether or not the decedent was then empowered to designate the decedent in place of the decedent's killer or the decedent then had capacity to exercise the power.

Id. § 30.1-10-03(1)(c). Also defined is "disposition or appointment of property" to include a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument; "governing instrument is defined as one executed by the decedent." *Id.* § 30.1-10-03(1)(a), (b). Included in the term "fiduciary or representative capacity" are personal representatives, executors, trustee and agents. *Id.* § 30.1-10-03(3)(a).

305. *Id.* § 30.1-10-03(3)(b). Unlike the prior law, the revised law explicitly states that the severance of a joint tenancy "transforms the interests of the decedent and killer into tenancies in common." *Id.* *See* In re Estate of Snortland, 311 N.W.2d 36, 38 (N.D. 1981) (determining that the effect of killing covered by the statute which called for a severance of a joint tenancy, was to create a tenancy in common).

306. N.D. CENT. CODE § 30.1-10-03(1), (3) (Supp. 1995) (effective until Jan. 1, 1996).

effect as if the killer disclaimed all revoked provisions.[307] The purpose of this approach is to have the law of right to disclaim apply and thus avoid any possibility that the descendants of the killer might take more property than the killer would have taken had there been no intentional and felonious killing.

C. REVOCATION OF PROBATE AND NONPROBATE TRANSFERS BY DIVORCE AND ANNULMENT

The law stating that an individual who is divorced from the decedent or whose marriage has been annulled is not a "surviving spouse" remains basically unchanged.[308] The revised law does, however, clarify one provision under which an individual would be estopped from claiming that he or she is a "surviving spouse" for purposes of an intestate share, elective share, omitted spouse's share, exempt property and family allowance. Adding the word "invalid" to this provision, the revised law now bars "an individual who, following an invalid decree of judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual" from claiming the status of "surviving spouse."[309] However, changes are added to the law that if after executing a will the testator is divorced or his or her marriage is annulled, the divorce or annulment revokes provisions in the will to the former spouse. The revised law has been expanded to cover not only wills but also nonprobate instruments.[310] Another change is that the revised law bars not only a former spouse from receiving any benefits from a decedent's transfers at death but also bars relatives of the divorced individual's former spouse from receiving any benefits.[311] These relatives are individuals who are related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, are not related to the divorced individual by blood, adoption or affinity.[312]

Under the revised law, a divorce or annulment of a marriage revokes: a) any revocable disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument; b) any disposition or appointment created by law

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307. N.D. CENT. CODE § 30.1-10-03(2), (5) (Supp. 1995) (effective Jan. 1, 1996). Only in the case of a revoked nomination in a fiduciary or representative capacity, does the law state that the killer is to be considered to have predeceased the decedent. *Id.* § 30.1-10-03(5).

308. *Id.* § 30.1-10-02. If the parties remarry and the spouse is married to the decedent at the time of death, then that spouse would be the "surviving spouse." *Id.*

309. *Id.* § 30.1-10-02(1).

310. *Id.* § 30.1-08-08.

311. *Id.* § 30.1-10-04(2)(a).

312. N.D. CENT. CODE § 30.1-10-04(1)(e) (Supp. 1995) (effective Jan. 1, 1996).

or in a governing instrument to a relative of the divorced individual's former spouse; c) any provision in a governing instrument conferring a general or special power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse; and d) any nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity.[313] The divorce or annulment also severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship.[314] When the provisions of a governing instrument have been revoked or severed, the effect is as if the former spouse and relatives of the former spouse disclaimed all such provisions.[315] In the case of a revoked nomination in a fiduciary or representative capacity, the effect is as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

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313. *Id.* § 30.1-10-04(2)(a). The definition section for this new law is as follows:

1. In this section:
a. "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.
b. "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of section 30.1-10-02. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.
c. "Divorced individual" includes an individual whose marriage has been annulled.
d. "Governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of the marriage to the former spouse.
e. "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorced or annulment, is not related to the divorced individual by blood, adoption, or affinity.
f. "Revocable," with respect to a disposition, appointment, provision, or nomination means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate the divorced individual in place of the former spouse or in place of the former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

Id. § 30.1-10-04(1).

314. *Id.* § 30.1-10-04(3). The joint tenancy with right of survivorship is transformed into a tenancy in common. *Id.* The severance does not affect any third-party interest in property acquired for value and in good faith unless a writing declaring the severance has been noted, registered, filed or recorded in appropriate records. *Id.* § 30.1-10-04(4).

315. *Id.* § 30.1-10-04(4). The prior law merely stated that property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent. N.D. CENT. CODE § 30.1-08-08 (Supp. 1995) (effective until Jan. 1, 1996).

VIII. CONCLUSION

Significant changes in the probate area were proposed in the 1940s with the Model Probate Code being published in 1946.[316] The task of redesigning probate law was undertaken by the Uniform Law Commission in 1970[317] and states, like North Dakota, have profited from its studies and proposed changes. By adopting most of the provisions of the revised Article II of the U.P.C., the North Dakota Legislature has updated the law to meet the new realities of a changing American society. One scholar has observed that the U.P.C. is very much in the "mainstream of an ongoing evolutionary process of probate reform."[318]

In the course of reforming probate law, the North Dakota Legislature might have to take another look at certain laws which either differ from the proposed changes of the U.P.C. or with the passage of time need to be scrutinized. If studies show that one spouse is effectively disinheriting another spouse by purchasing life insurance on the lives of persons other than the surviving spouse, then the proceeds of such life insurance policies might have to be included in the augmented estate.[319] If the trend continues to have more assets of a deceased spouse treated as marital property, then transfers of more property, such as a presently exercisable general power of appointment, created by and for such deceased spouse both before and during the marriage might have to be included in the augmented estate.[320]

The two themes promoted by the revised Article II of the U.P.C. of eliminating stringent formalities in the probate area and unifying the law of probate and nonprobate transfers point in the direction of applying to wills the same law applicable to other legal devices for transferring property including those devices used in business transactions. Foremost

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316. Averill & Brantley, *supra* note 4, at 636.

317. *Id.* at 637.

318. Mary Louise Fellows, *Traveling the Road to Probate Reform: Finding the Way to Your Will*, 77 MICH. L. REV. 639, 681 (1993); Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code*, 77 MINN. L. REV. 639, 642 (1993). *See* Martin D. Begleiter, *Article II of the U.P.C. and the Malpractice Revolution*, 59 TENN. L. REV. 101, 102-03 (1991) (commenting on the fact that the U.P.C. has clarified the law in many areas with the exception of the anti-lapse statute and concluding that the many improvements in the U.P.C. should lessen the claims of malpractice litigation).

319. U.P.C. §§ 2-205(1)(iv), 2-205 (1)(3)(ii) (1990) (amended 1993). Like North Dakota, Montana does not require insurance policies and annuity plans payable to persons other than the deceased's surviving spouse to be included in the augmented estate. Minnesota requires insurance, annuity contracts, and retirement plans to be included in the augmented estate. MINN. STAT. ANN. § 524.2-205 (West Supp. 1995).

320. U.P.C. § 2-205(1)(i) (1990) (amended 1993). *See* Rena C. Sepolwitz, *Transfers Prior to Marriage and the Uniform Probate Code's Redesigned Elective Share - Why the Partnership is Not Yet Complete*, 25 IND. L. REV. 1 (1991).

among these laws applicable to nonprobate transfers is the dispensing power or the substantial compliance doctrines which would allow, for example, a will that was not executed according to the statute of wills to be, nonetheless, valid under certain circumstances.[321] The law already recognizes that a provision for a nonprobate transfer on death in an insurance policy, promissory note, mortgage, pension plan, trust, deed of gift, property settlement and other written instruments of a similar nature is nontestamentary.[322] As stated in the U.P.C.'s Comment:

> The drafters of the original Uniform Probate Code declared in the Comment that they were unable to identify policy reasons for continuing to treat these varied arrangements as testamentary. The drafters said that the benign experience with such familar will substitutes as the revocable intervivos trust, the multiple-party bank account and United States government bonds payable on death to named beneficiaries all demonstrated that the evils envisioned if the statute of wills were not rigidly enforced simply do not materialize. The Comment also observed that because these provisions often are part of a business transaction and are evidenced by a writing, the danger of fraud is largely eliminated.[323]

How long it will take for the states to recognize a will as one legal device among many others for transferring property at death and to treat all devices equally remains to be seen. Most statutes of wills, even those which require minimum formalities, still keep wills on a pedestal above nonprobate devices.[324]

The North Dakota Legislature might also consider three other changes promoted by the U.P.C. Under current law only a surviving spouse or minor children whose deceased spouse or parent in whom the title to real property constituting a homestead is vested, is entitled to a

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321. U.P.C. § 2-503 (1990) (amended 1993).

322. N.D. CENT. CODE § 30.1-31-01 (Supp. 1995). More specifically this statute states:

> A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary.

Id. The term in this law "or other written instrument of a similar nature" replaced former language which the U.P.C. Comment states was interpreted incorrectly by one court but correctly by another in First National Bank in Minot v. Bloom, 264 N.W.2d 208, 212 (N.D. 1978). U.P.C. § 6-101 cmt. (1990) (amended 1993).

323. U.P.C. § 6-101 cmt. (1990) (amended 1993).

324. N.D. CENT. CODE § 30.1-08-02 (Supp. 1995) (effective January 1, 1996). *See Voeller*, 543 N.W.2d at 26.

homestead estate.[325] The legislature, following the U.P.C., could adopt a homestead allowance of a set amount, such as $15,000, for every surviving spouse or minor child either in lieu of or in addition to the homestead estate exemption.[326] Second, the legislature could adopt a comprehensive anti-lapse statute for wills which would answer a number of construction questions that have arisen under the pre-1990 anti-lapse statute which currently remains in effect.[327] Third, in the case of intestacy, if studies show that persons would want all those related to them in the same degree of kinship to take equally, the legislature might adopt the per capita system of representation.[328]

The adoption of the Uniform Marital Property Act would have a significant impact on probate law.[329] This Act calls for shared and vested ownership rights in marital property which would be in place not only at the time of divorce but also at death.[330] The Act is not identical to but does parallel sharing under community property systems.[331] In one section of the U.P.C. there is an alternative provision for community states.[332]

In sum, it has been the experiences with the pre-1990 law and various developments, such as the rise in multiple marriages with persons having step-children and children from previous marriages, that have prompted the present changes.[333] In the forthcoming years, it can be expected that the current revised law will also be subject to a similar review.

325. N.D. CENT. CODE § 30-16-02 (1976).
326. U.P.C. § 2-402 (1990) (amended 1993).
327. U.P.C. § 2-603 (1990) (amended 1993). The North Dakota Legislature adopted a comprehensive anti-lapse statute applicable to governing instruments. N.D. CENT. CODE § 30.1-09.1-06 (effective Jan. 1, 1996) (Supp 1995).
328. U.P.C. § 2-106 (1990) (amended 1993).
329. 9A U.L.A. 103 (1987).
330. 9A U.L.A. Prefatory Note 99 (1987).
331. *Id.*
332. U.P.C. § 2-102A (1990) (amended 1993).
333. U.P.C. pref. note, art. II revisions (1990) (amended 1993).